No. 15093

United States Court of Appeals

for the Ninth Circuit

AUTREY BROTHERS, INC., LEWIS AUTREY, STELLA AUTREY and SLEEP E-Z MATTRESS CO., a Corporation,

Appellant,

vs.

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., Doing Business as Airest Mattress Co., Bankrupt,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—6-22-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

BERTRAM H. ROSS,
453 South Spring Street,
Los Angeles 13, California.

Attorney for Appellee:

CRAIG, WELLER & LAUGHARN,
111 West Seventh Street,
Los Angeles 14, California.

In the District Court of the United States,
Southern District of California, Central Division

Civil No. 17354-WB

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., dba Airest Mattress Co., Bankrupt,

Plaintiff,

vs.

AUTREY BROTHERS, INC., LEWIS AUTREY and STELLA AUTREY,

Defendants.

COMPLAINT

(Suit by Trustee to Avoid Fraudulent Conveyances. Bankruptcy Act, Sections 67-e and 70-e; Civil Code of California, Sec. 3440; Oregon Rev. Stat. Sec. 79.010, et seq.; Remington's Rev. Code of Wash. Sec. 5832, et seq., Utah Code Title 25-2-1, et seq.)

The plaintiff for his first cause of action, complains of the defendants and alleges:

I.

That at all times hereinafter mentioned, Veraco, Inc., which will hereinafter be sometimes referred to as the "bankrupt," was, since has been and still is a corporation organized and existing under and by virtue of the laws of the State of California, and doing business in Los Angeles County, State of California, and elsewhere, as Veraco, Inc., also doing business as Airest Mattress Co.

II.

That at all times hereinafter mentioned, the defendant Autrey Brothers, Inc., was, since has been and still is a [10*] corporation organized and existing under and by virtue of the laws of the State of California, and that substantially all, if not all, of the capital stock of Autrey Brothers, Inc., was and is owned and controlled by the defendants Lewis Autrey and Stella Autrey, who at all times hereinafter mentioned were and now are husband and wife, and are also, so plaintiff believes and therefore alleges the fact to be, officers and directors of said defendant Autrey Brothers, Inc.

III.

That this is an action brought by the plaintiff under the provisions of Sections 67-d and 67-e and Section 70-e of the National Bankruptcy Act and the Bulk Sales Laws of California, Oregon, Washington and Utah, as hereinafter set forth in this and subsequent causes of action, for the purpose of avoiding fraudulent and void transfers by the bankrupt, Veraco, Inc. to Autrey Brothers, Inc. and the defendants Lewis Autrey and Stella Autrey, and to recover the value of stocks in trade so fraudulently transferred by said bankrupt Veraco, Inc., to the defendants herein and to Autrey Brothers, Inc., the corporation owned and controlled by them.

IV.

That on November 9, 1953, and for a long time

*Page numbering appearing at foot of page of original Certified Transcript of Record.

prior thereto, the bankrupt Veraco, Inc., was engaged as a retail merchant selling mattresses and other bedding equipment at retail at certain stores located at No. 2039 W. Pico Boulevard, Los Angeles, California; 17113 Bellflower Boulevard, Bellflower, California, and 11950 E. Garvey Boulevard, El Monte, California, and was purchasing, selling and and dealing with said merchandise on credit.

V.

That on November 9, 1953, the bankrupt Veraco, Inc., transferred to the defendants Lewis Autrey and Autrey Brothers, [11] Inc., the entire stock, fixtures, equipment and trucks belonging to the retail stores owned and operated by said bankrupt, Veraco, Inc., situated at No. 2039 W. Pico Boulevard, Los Angeles, California, 17,113 Bellflower Boulevard, Bellflower, California, and 11,950 E. Garvey Boulevard, El Monte, California; that neither the bankrupt Veraco, Inc., nor the defendants Lewis Autrey or Autrey Brothers, Inc., or either or any of them, or any of the officers or directors of the defendant Autrey Brothers, Inc., caused to be recorded in the office of the County Recorder of Los Angeles County, California, where its said stocks were situated, at least ten days prior to the date of said transfers, a notice of intention to transfer said stocks in trade in bulk or otherwise than in the ordinary course of trade and the regular and usual practice and method of business of the transferor, Veraco, Inc., nor was any such notice

ever published in a newspaper of general circulation published in the township in which such transfer was intended to be made and where such stocks in trade were located, containing a general statement of the character of the merchandise or property intended to be transferred, the date when and the place where the purchase price or consideration was to be paid, the name and address of the intended vendor, transferor or assignor, and the name and address of the intended vendee, transferee or assignee, as required under the provisions of Section 3440 of the Civil Code of California.

VI.

That at the time of said transfer the bankrupt, Veraco, Inc., was indebted to numerous and divers creditors whose claims remain due, owing and unpaid, and constitute liabilities of Veraco, Inc. in its bankruptcy proceeding, among whom are the following:

Times-Mirror Co., Los Angeles, California, which was a [12] creditor of the bankrupt on open account as of the date of said transfer in the sum of $704.76, and on which open account there remained due, owing and unpaid at the date of bankruptcy of Veraco, Inc., the sum of $2,465.87, and which open account was never balanced at any time between the date of said transfer hereinbefore set forth and the date of bankruptcy of Veraco, Inc.

VII.

That the value of the merchandise and fixtures so transferred by said bankrupt to the defendants was the sum of $20,346.03.

VIII.

That as to creditors existing against the bankrupt on November 9, 1953, said transfer of said stocks in trade, fixtures and equipment was fraudulent and void, and is fraudulent and void as against the plaintiff herein.

IX.

That on August 10, 1954, Veraco, Inc., doing business as Airest Mattress Co., filed a voluntary petition in bankruptcy in the District Court of the United States for the Southern District of California, Central Division, praying that it be adjudged a bankrupt within the purview of Section 4, Subd. (a) of the National Bankruptcy Act, and on the same date, August 10, 1954, it was adjudicated a bankrupt; that at the First Meeting of creditors had and held on August 30, 1954, the plaintiff herein was elected Trustee in bankruptcy by creditors of said bankrupt, filed his bond and qualified, and at all times since August 30, 1954, plaintiff was, since has been and now is the duly elected, qualified and acting Trustee in bankruptcy for the estate of Veraco, Inc.

And for His Second Cause of Action Against the Defendants, Plaintiff complains and [13] alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in Paragraphs I, II, III and IX of the plaintiff's first

cause of action and makes them a part hereof by reference.

II.

That on November 5, 1953, and for a long time prior thereto, the bankrupt, Veraco, Inc. was engaged as a retail merchant selling mattresses and other bedding equipment at retail at a certain store located at No. 850 South Main Street, Salt Lake City, Utah, and was purchasing and dealing with said merchandise on credit.

III.

That on November 5, 1953, the Bulk Sales Law of the State of Utah, being known as Title 25, Chapter 2, Sections 1, 2, 3 and 4 read as set forth in Exhibit "A" hereto attached and made a part hereof by reference the same as though the statute was set forth in this paragraph.

IV.

That on or about November 5, 1953, the bankrupt, Veraco, Inc., at Beverly Hills, California, transferred the entire stock of merchandise situated in the stores described in the preceding paragraphs in Salt Lake City, Utah, together with the fixtures and equipment therein contained; that the defendants nor none of them demanded of or received from the bankrupt a certain statement in writing as set forth in Title 25, Chap. 2, Sec. 1 of said Utah Bulk Sales Law, containing the names and addresses of all of the creditors of the bankrupt, Veraco, Inc., together with the amount of the indebtedness due

or owing by said seller or transferor, Veraco, Inc., to each of such creditors, nor was such a sworn statement furnished by the seller, Veraco, Inc. at least five (5) days previous to said transfer or at all, [14] nor did the bankrupt, Veraco, Inc., or the defendants herein or any of them, at least five (5) days prior to the transfer in bulk of said stock and fixtures, which transfer was not made in the ordinary and regular course of business of Veraco, Inc., notify personally or by registered mail every creditor as shown upon such verified statement of the proposed sale or transfer, with the price thereof, the name of the person to whom such sale or transfer was to be made, and the time and conditions of payment, nor did they or any of them cause any purchase money or consideration for said property to be applied ratably, except as to the priorities provided by law of the State of Utah, to the payment of bona fide claims of creditors of the seller as shown upon such verified statement.

V.

That at the time of said transfer of said merchandise and fixtures in bulk, the bankrupt, Veraco, Inc. was indebted to numerous and divers creditors whose claims remain unpaid and constitute liabilities of Veraco, Inc. in its bankruptcy proceeding, among whom are the following:

Times-Mirror Co., Los Angeles, California, which was a creditor of the bankrupt on open account as of the date of said transfer in the sum of $704.76, and on which open account there remained due, owing

and unpaid at the date of bankruptcy of Veraco, Inc., the sum of $2,465.87, and which open account was never balanced at any time between the date of said transfer hereinbefore set forth and the date of bankruptcy of Veraco, Inc.

VI.

That the value of the merchandise and fixtures so transferred by said bankrupt to the defendants Lewis Autrey and Autrey Brothers, Inc., a corporation owned and controlled by the defendants herein was the sum of $15,395.36. [15]

VII.

That the defendants, nor none of them, paid existing creditors of the bankrupt, Veraco, Inc., their proportionate share of the full purchase price of said stock in trade and fixtures, nor was any waiver of notice produced by the bankrupt, Veraco, Inc. in writing, waiving the provisions of Chapter 2 of the Utah Code Ann., as provided in Section 4 of Chapter 2 of Title 25, and as to existing creditors of said bankrupt vendor, said sale was fraudulent and void and is fraudulent and void as to plaintiff herein.

And for a Third Cause of Action Against the Defendant, Plaintiff Complains and Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in Para-

graphs I, II, III and IX of plaintiff's first cause of action and makes them a part hereof by reference.

II.

That on November 16, 1953, and for a long time prior thereto, the bankrupt, Veraco, Inc., was engaged as a retail merchant selling mattresses and other bedding equipment at retail at a certain store located at No. 2800 N. E. Sandy Boulevard, Portland, Oregon, and was purchasing and dealing with said merchandise on credit.

III.

That on or about November 16, 1953, the bankrupt, Veraco, Inc., at Beverly Hills, California, transferred to the defendants Lewis Autrey and Autrey Brothers, Inc., a corporation owned, controlled, operated and directed by the defendants herein, all of the stock, fixtures, and equipment belonging to said retail store not in the ordinary course of trade of the [16] business or trade of Veraco, Inc. but in bulk, without complying with the terms of the Oregon Bulk Sales Law, namely, Chapter 79.010, Oregon Revised Statutes, Chapter 70.020, 79.030 and 79.040 of said Bulk Sales Law of Oregon, a full, true and correct copy of which is hereto attached and set forth as Exhibit "B," the same as though said statute were set forth in this paragraph.

IV.

That none of the defendants named herein demanded or received from the bankrupt vendor,

Veraco, Inc., or from a managing officer or agent thereof, at least five (5) days before the consummation of such purchase or transfer or prior to making any payment to said bankrupt, Veraco, Inc., of more than 10% of the sale price, a written statement under oath containing the names and addresses of all of the creditors of the vendor, Veraco, Inc., together with the amount of indebtedness due or owing or to become due or owing by the vendor, Veraco, Inc., to each of such creditors, or a written statement under oath that there were no creditors of said vendor, Veraco, Inc., now a bankrupt, nor did Veraco, Inc., furnish any such statement to the defendants herein, or any of them, at least five (5) days before the consummation of such sale or transfer, nor did the defendants or any of them, at least five (5) days before the consummation of such sale or transfer of such stock in trade in bulk, notify or cause to be notified personally, by wire or registered mail, each of the creditors of the vendor named in any statement of the proposed purchase or transfer of said stock in trade and fixtures.

V.

That at the time of said transfer by the bankrupt to the defendants herein, the bankrupt, Veraco, Inc., was indebted to numerous and divers creditors whose claims remain owing and [17] unpaid and constitute liabilities of Veraco, Inc., in its bankruptcy proceeding, among whom are the following:

Times-Mirror Co., Los Angeles, California, which was a creditor of the bankrupt on open account as

of the date of said transfer in the sum of $704.76, and on which open account there remained due, owing and unpaid at the date of bankruptcy of Veraco, Inc., the sum of $2,465.87, and which open account was never balanced at any time between the date of said transfer hereinbefore set forth and the date of bankruptcy of Veraco, Inc.

VI.

That the value of the merchandise and fixtures so transferred by said bankrupt to the defendants Lewis Autrey and Autrey Brothers, Inc., a corporation owned, controlled and directed by the defendants, was the sum of $21,846.68.

VII.

That as to creditors existing against said bankrupt Veraco, Inc., on November 16, 1953, said transfer of said stock in trade, fixtures and equipment was fraudulent and void and is fraudulent and void as against the plaintiff herein.

And for a Fourth Cause of Action Against the Defendants, the Plaintiff Complains and Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in Paragraphs I, II, III and IX of plaintiff's first cause of action, and makes them a part hereof by reference.

II.

That on November 16, 1953, and for a long time prior thereto, the bankrupt Veraco, Inc., was en-

gaged as a retail merchant selling merchandise and other bedding equipment at retail at certain stores located at No. 5311 South Tacoma Way, City of [18] Tacoma, County of Pierce, and State of Washington, and at No. 7808 Aurora Boulevard, in the City of Seattle, County of King, in the State of Washington, and was purchasing and dealing with said merchandise on credit.

III.

That on or about November 16, 1953, the bankrupt Veraco, Inc., at Beverly Hills, California, transferred to the defendants Lewis Autrey and Autrey Brothers, Inc., a corporation owned and controlled, operated and directed by the defendants herein, all of the stock in trade, fixtures and equipment belonging to both of said retail stores so situated in Seattle and Tacoma, Washington, valued at $18,727.55 which said transfer was not made in the regular and during the course of business of the bankrupt Veraco, Inc., but was made in bulk; that on November 16, 1953, when said transfer was made, the Bulk Sales Law of the State of Washington known as Title 37, Chapter 2, Sections 5832, 5833, 5834 and 5835 of Remington's Revised Statutes of Washington, as set forth in Exhibit "C" hereto attached and made a part hereof the same as though said Bulk Sales Law were set forth in this paragraph.

IV.

That the bankrupt and the defendants herein failed and neglected to observe the provisions of

Chapter 2, Sections 5832 to 5835, inclusive, of Remington's Revised Statutes of Washington, in the following respects, namely: That before the consummation of said transfers, or before paying to the vendor or its agent or representative, or the giving of any promissory note or other evidence of indebtedness therefor, the defendants herein did not demand of and receive from the vendor, Veraco, Inc., or its agent, or from its president, vice president, secretary, treasurer or managing agent of such corporation, a statement in writing sworn to, giving the names and addresses of all of the creditors of the vendor, Veraco, Inc., to which [19] Veraco, Inc., was indebted for or on account of any goods, wares and merchandise or fixtures and equipment used in and about the business of said vendor, Veraco, Inc., purchased on credit, or for or on account of money borrowed to carry on the business of the vendor of which the goods, wares and merchandise and/or fixtures and equipment bargained for or purchased or transferred were a part, together with the amount of indebtedness due and owing and to become due and owing by the vendor, Veraco, Inc., to each of such creditors, nor did the vendor, Veraco, Inc., or its agent or officers furnish any such statement as required under Section 5832 of the Washington Bulk Sales Law hereinbefore set forth, verified under oath, nor did the defendants or any of them file one of such statements in the office of the County Auditors of Pierce County, Washington or King County, Washington, or either of said County Audi-

tors in which counties the stock and/or fixtures proposed to be purchased or transferred were situated at least five (5) days before the consummation of said purchase or transfers, and caused the same to be indexed as chattel mortgages are indexed the name of the vendor being indexed as mortgagor, and the name of the intended purchaser or transferee as mortagagee, nor did the defendants, or any of them, cause to be applied such purchase price pro rata to the payment of bona fide claims of the creditors of the vendor, Veraco, Inc., now a bankrupt, as shown upon said verified statement in the office of the County Auditor, filed at least five (5) days before the consummation or purchase as provided in Section 5832 of the Washington Bulk Sales Act, and as a result thereof said sale or transfer was fraudulent and void as to creditors of the vendor, Veraco, Inc., and is null and void as to the plantiff herein as Trustee in bankruptcy for the estate of Veraco, Inc., bankrupt. [20]

V.

That at the time of said transfers from the bankrupt to the defendants herein, the bankrupt Veraco, Inc., was indebted to numerous and divers creditors whose names remain due, owing and unpaid and constitute liabilities of Veraco, Inc., in its bankruptcy proceeding, among whom are the following, namely:

Times-Mirror Co., Los Angeles, California, which was a creditor of the bankrupt on open account as of the date of said transfer in the sum of $704.76,

and on which open account there remained due, owing and unpaid at the date of bankruptcy of Veraco, Inc., the sum of $2,465.87, and which open account was never balanced at any time between the date of said transfer hereinbefore set forth and the date of bankruptcy of Veraco, Inc.

And for a Fifth Cause of Action Against the Defendants, Plaintiff Complains and Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in the entirety of the plaintiff's first, second, third and fourth cause of action, and makes them a part hereof by reference.

II.

That after the transfers complained of in the plaintiff's first, second, third and fourth causes of action, the defendants herein took possession of and operated the places of business set forth in said first four causes of action, including contingent reserves on conditional sales contracts in the possession of Personal Finance Co., belonging to the bankrupt corporation and accounts receivable held by it, in an unknown amount, which accounts receivable have since been collected by defendants herein, and made, so plaintiff is informed and believes and therefore alleges the fact to be, substantial [21] profits from the operation of said retail places of business in an amount unknown to the plaintiff herein, and the amount of which said profits can

only be ascertained by an accounting between the plaintiff and the defendants herein.

III.

That as a result of the transfers complained of by the plaintiff in his first four causes of action herein, the bankrupt Veraco, Inc., was rendered hopelessly insolvent, is insolvent, and the recovery and collection of a judgment against the defendants herein for the actual physical value of the stock in trade and fixtures transferred to the defendants herein, as described in the plaintiff's first four causes of action herein, will not be sufficient to pay the unpaid indebtedness of the bankrupt, Veraco, Inc., after payment of the expenses of administration incurred in its bankruptcy proceeding; that an accounting of profits made by the defendants out of said stores and the stock and fixtures thereof so transferred by the bankrupt Veraco, Inc., to the defendants herein is necessary and judgment should be rendered against the defendants herein in favor of the plaintiff for the amount of such profits so realized and appropriated by the defendants herein.

And for a Sixth Cause of Action Against the Defendants, and Particularly Against the Defendant Lewis Autrey, Plaintiff Complains and Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge made in his first,

second, third and fourth causes of action, and makes them a part hereof by reference.

II.

That on November 5, 1953, and November 16, 1953, the [22] defendant Lewis Autrey was an officer and director not only of the defendant Autrey Brothers, Inc., but was also an officer and director of the bankrupt corporation, Veraco, Inc., doing business as the Airest Mattress Co., now a bankrupt.

III.

That on or about November 5, 1953, the defendant Lewis Autrey, while an officer and director of said bankrupt corporation, Veraco, Inc., and was authorized to sign and draw checks on its bank account, and within one year prior to the filing of the petition in bankruptcy of Veraco, Inc., caused the transfers complained of in the plaintiff's first four causes of action herein to be made by the bankrupt involuntarily and without legal proceedings, by the means and in the manner as hereinafter specifically set forth.

IV.

That the bankrupt, Veraco, Inc. was the sales outlet for the defendant Autrey Brothers, Inc. and it was contemplated during the operations of Veraco, Inc., that it would sell merchandise manufactured by the defendant Autrey Brothers, Inc., as a retail outlet, and that said sales made at retail were not to be made at a substantial profit accruing to the bankrupt, Veraco, Inc., but that the profits derived from said retail sales would be accrued for the benefit of the

defendant Autrey Brothers, Inc. and shared equally between the defendants Lewis Autrey and Autrey Brothers, Inc. on the one hand, and Veraco, Inc., now a bankrupt, and Vernon W. Autrey, who owned and controlled 50% of the capital stock of the bankrupt, Veraco, Inc.

V.

That on November 5, 1953, the defendant Lewis Autrey charged Vernon W. Autrey, an officer and director of Veraco, Inc., with misappropriating or diverting the sum of $95,000.00 claimed by the said Lewis Autrey to be due the defendants Autrey Brothers, [23] Inc. and Lewis Autrey from the bankrupt, Veraco, Inc. and Vernon W. Autrey, and threatened that unless Vernon W. Autrey and Veraco, Inc., the bankrupt, transferred and delivered over to the defendants Autrey Brothers, Inc. and Lewis B. Autrey, the retail outlets, the transfers of which are complained of in the plaintiff's first four causes of action herein, he, the said Lewis B. Autrey and Autrey Brothers, Inc. would cause Vernon Autrey and Veraco, Inc., now a bankrupt, to be criminally prosecuted for embezzlement or misappropriation of funds belonging to the defendants Lewis Autrey and Autrey Brothers, Inc.

VI.

That on November 5, 1953, acting under menace, duress and intimidation on the part of the defendant Lewis Autrey, and believing that the defendant Lewis Autrey would cause him, the said Vernon W. Autrey, to be arrested and criminally prosecuted

on a charge of misappropriation and embezzlement, and without knowledge of the true facts as to whether or not he, the said Vernon W. Autrey, or the bankrupt, Veraco, Inc., had diverted more than their share of the profits from the sale of merchandise through said retail outlets operated by Veraco, Inc., the said Vernon W. Autrey, on behalf of the bankrupt Veraco, Inc., was coerced by defendants into signing agreements in writing under date of November 5, 1953, and November 16, 1953, whereby the various retail outlets described in the plaintiff's first four causes of action were transferred by the bankrupt, Veraco, Inc. and Vernon W. Autrey to the defendants Autrey Brothers, Inc., and Lewis Autrey.

VII.

That said charges made by the defendant Lewis Autrey against Vernon W. Autrey and Veraco, Inc. were false and untrue; that in truth and in fact there was actually due, owing and unpaid from Autrey Brothers, Inc. and Lewis Autrey, the defendants [24] herein, to Veraco, Inc., the bankrupt, and to Vernon W. Autrey, the sum of $52,111.69; that said charge that the bankrupt, Veraco, Inc. and Vernon W. Autrey had misappropriated or embezzled the sum of $95,000.00 belonging to the defendants herein was without foundation in fact and was made only for the purpose of humiliating, coercing and intimidating the bankrupt and Vernon W. Autrey into making the conveyances complained of in the first four causes of action herein.

VIII.

That said transfers and each of them were made to the defendants without a fair consideration and resulted in the bankrupt, Veraco, Inc., being rendered insolvent and unable to pay its debts, and left said bankrupt engaged in a retail business for which the property remaining in its hands constituted an unreasonably small capital and was not accepted by the defendants herein, or any of them, in good faith, but on the contrary the property so extorted by the defendants herein from the bankrupt, Veraco, Inc., was involuntarily extorted by the defendants Lewis Autrey and Autrey Brothers, Inc. with the intent and purpose on their part that the creditors, both existing and future, of Veraco, Inc. should be hindered, delayed or defrauded in the collection of their debts.

IX.

That at the time of the obtaining of said agreements of November 5, 1953, and November 16, 1953, as hereinbefore described, the bankrupt Veraco, Inc. was indebted to the Times-Mirror Company on open account in the amount of $704.76, and at the date of bankruptcy was indebted to said Times-Mirror Company on open account in the sum of $2,465.87, and became indebted subsequently to November 5, 1953, and November 16, 1953, to numerous other and divers creditors who are creditors in the bankruptcy proceeding of Veraco, Inc. in a sum in excess of $100,000. [25]

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

1. On the first cause of action for the sum of $20,346.03, together with interest on said sum from November 5, 1953, at 7% per annum.

2. On the second cause of action for the sum of $15,395.36, with interest on said sum from November 5, 1953, at 7% per annum.

3. On the third cause of action for the sum of $21,846.68, together with interest on said sum from November 16, 1953, at 7% per annum.

4. On the fourth cause of action for the sum of $18,727.55 at the rate of 7% per annum from November 16, 1953, at the rate of 7% per annum.

5. On the fifth cause of action, that in the event judgment is rendered in favor of the plaintiff, an accounting be had between the plaintiff and defendants herein, and a Master be appointed to take such account and ascertain the amount due plaintiff from the defendants herein under such accounting, and that the plaintiff have and recover judgment against the defendants for the amount of such accounting.

6. On the sixth cause of action, for judgment against the defendants for the sum of $76,315.62, together with interest on said sum from November 16, 1953, at 7% per annum.

7. That the plaintiff have and recover all of his costs and disbursements herein, and be given

such other and further relief as the Court may deem just and equitable in the premises.

CRAIG, WELLER &
LAUGHARN,
By /s/ THOMAS S. TOBIN.

BUCHALTER, NEMER &
FIELDS,
By /s/ MURRAY M. FIELDS,

Attorneys for Plaintiff. [26]

EXHIBIT A

The Bulk Sales Law of the State of Utah, Title 25, Chap. 2, Sections 1, 2, 3 and 4, reads as follows: "Sale of Merchandise in Bulk.

"25-2-1. Purchaser must demand list of creditors.—It shall be the duty of every person who shall bargain for or purchase any portion of a stock of goods, wares or merchandise in bulk otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or any portion of the property, furniture, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business, used in carrying on such business, otherwise than in the regular course of trade, before paying to the seller any part of the purchase price thereof, or delivering any promissory note or other

evidence of indebtedness therefor, to demand of and receive from such seller a sworn statement in writing, substantially as hereinafter provided, of the names and addresses of all the creditors of the seller, together with the amount of the indebtedness due or owing by the seller to each of his creditors, and it shall be the duty of the seller to furnish such statement, which shall be verified by oath to substantially the following effect:

"State of Utah,
"County of .....

"Before me personally appeared (seller or agent, as the case may be) who being by me first duly sworn, on his oath, did depose and say that the foregoing statement contains the names of all the creditors of (name of seller), together with their addresses, and that the amount set opposite their respective names is the amount now due and owing or which will become due and owing by (seller) to such creditors, [27] and that there are no creditors holding claims due or which will become due for or on account of goods, wares or merchandise purchased upon credit, or for the purchase price due and owing by (seller) to such creditors, or for the purchase price of fixtures or equipment, or for services performed, or on account of money borrowed to carry on the business to which said goods, fixtures, equipment or supplies appertain, other than as set forth in said statement and in this affidavit, that are within the knowledge of affiant.

"Subscribed and sworn to before me this .. day of ....., 19..

"25-2-2. Creditors to be notified.—Whenever any person shall bargain for or purchase any portion of a stock of merchandise in bulk otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or the property, furniture, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business used in carrying on such business, otherwise than in the regular course of trade, and shall pay any part of the price, or deliver to the seller thereof, or to any person for his use, any promissory note or other evidence of indebtedness, or receive credit, whether or not evidenced by a promissory note or other evidence of indebtedness, for the purchase price or any part thereof, without at least five days previously thereto having demanded of and received from the seller the statement provided for in section 25-2-1, verified as therein provided, and without notifying at least five days previously thereto, personally or by registered mail, every creditor as shown upon such verified [28] statement of the proposed sale or transfer, with the price thereof, the name of the person to whom such sale or transfer is to be made, and the time and conditions of payment, and without causing the purchase money for such property to be applied ratably, except as to priorities provided by law, to the payment of the bona fide claims of creditors of the seller as

shown upon such verified statement, such sale or transfer shall be fraudulent and void unless the buyer shall pay the creditors of the seller as herein provided their proportionate share of the full purchase price.

"25-2-3. False statement deemed perjury.—Any seller of any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or the property, fixtures, equipment or supplies of a hotel, restaurant, barber shop or other business, used in carrying on such business, and any person acting for or on behalf of any such seller, who shall knowingly or willfully make or deliver or cause to be made or delivered a statement as provided for in section 25-2-1 that shall not include the names of all of the creditors of such seller, with the correct amount due and to become due to each of them, or which shall contain any false statement, shall be deemed guilty of perjury.

"25-2-4. What is deemed a sale—Waiver by creditors.—If any person sells any portion of a stock of merchandise otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, or an entire stock of merchandise in bulk, or the property, fixtures, equipment or supplies of a hotel, restaurant, [29] barber shop or other business, used in carrying on said business, or whenever an interest in or to the

business or trade of the seller is sold or conveyed or attempted to be sold or conveyed, such shall be deemed a sale and transfer in contemplation of this chapter; provided, that if such seller produces and delivers a written waiver of the provisions of this chapter from at least a majority in number and amount of his creditors as shown by such verified statement, then and in that case the provisions of this chapter shall not apply.

"25-2-5. Certain sales excepted from chapter.—Nothing contained in this chapter shall apply to sales or transfers by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or any public officer under judicial process." [30]

EXHIBIT B

The Bulk Sales Law of the State of Oregon, Oregon Revised Statutes, Chapters 79.010, 79.020, 79.030 and 79.040, reads as follows:

"79.010.

"Duties of buyer and seller in bulk sales. Every person who bargains for, or purchases for cash or on credit, the goods, wares and merchandise in bulk of any commercial business or establishment, including restaurants and other food dispensing establishments, or substantially all the furniture, fixtures, supplies or equipment of any such business

or establishment, including motor vehicles, shall demand and receive from the vendor thereof, or if the vendor is a corporation from a managing officer or agent thereof, at least five days before the consummation of such purchase and prior to making payment to the vendor of more than 10 per cent of the sale price, a written statement under oath containing the names and addresses of all the creditors of the vendor, together with the amount of indebtedness due or owing, or to become due or owing, by the vendor to each of such creditors, and if there is no creditor, a written statement under oath to that effect. The vendor shall furnish such statement at least five days before the consummation of any such sale.

"79.020. Necessity of notice by buyer to creditors of seller. After receiving from the vendor the written statement mentioned in ORS 79.010, the vendee shall at least five days before the consummation of such sale notify or cause to be notified personally, by wire or by registered letter, each of the creditors of the vendor named in the statement, of the proposed purchase. Whenever any person purchases such personal property or business without notifying or causing to be notified all the creditors of the vendor named in such statement, such purchase, sale or [31] transfer as to any creditor of the vendor not so notified is conclusively presumed fraudulent and void.

"79.030. False statement or omission of creditor's name in statement. Any vendor of such per-

sonal property or business who knowingly makes or delivers, or causes to be made or delivered, any statement which is false or of which any material portion is false, or who fails to include the names of all his creditors in the statement required by ORS 79.010, shall be deemed guilty of perjury, and upon conviction thereof shall be punished accordingly.

"79.040. Transactions covered by this chapter. Any sale of such personal property or business which is out of the usual course of the business or trade of the vendor, or by which substantially the entire business or trade theretofore conducted by the vendor is sold or conveyed, or attempted to be sold or conveyed, to any person is a sale or transfer in bulk within the meaning of this chapter; but nothing in this chapter applies to sales by executors, administrators, receivers or any public officer acting under judicial process." [32]

EXHIBIT C

The Bulk Sales Law of the State of Washington, known as Title 37, Chapter 2, Sections 5832, 5833, 5834 and 5835, of Remington's Revised Statutes of Washington, reads as follows:

"5832. Vendor to give list of creditors—Affidavit —Copy of statement—Filing. It shall be the duty of every person who shall bargain for or purchase all or substantially all of any stock of goods, wares or

merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business carried on by the vendor, in bulk, for cash or on credit, before paying the vendor, or his agent or representative, or delivering to the vendor, or his agent, any of the purchase price thereof, or any promissory note or other evidence of indebtedness therefor, to demand of and receive from such vendor, or his agent, or, if the vendor or agent be a corporation, then from the president, vice-president, secretary, treasurer or managing agent of such corporation, a statement in writing, sworn to substantially as hereinafter provided, giving the names and addresses of all of the creditors of the vendor, to whom the vendor may be indebted, for or on account of any goods, wares or merchandise, and/or fixtures and equipment, used in and about the business of the vendor, purchased upon credit, or for or on account of money borrowed to carry on the business of the vendor, of which the goods, wares and merchandise, and/or fixtures and equipment, bargained for or purchased, are a part, together with the amount of indebtedness due and owing and to become due and owing, by the vendor, to each of said creditors; and it shall be the duty of said vendor, or agent, to furnish such statement, which shall be verified under oath, to the following [33] effect:

"State of Washington,
"County of .....—ss.

"....., being first duly sworn, on oath says, I am the vendor (or the agent of ....., the

vendor, of the officer, naming him, of the corporation vendor, as the case may be) of that certain stock of goods, wares and merchandise, and/or fixtures and equipment, situated at No. ...., ... Street, in the City (or town) of ....., county of ....., State of Washington, this day bargained to be sold to ....., the vendee; that the foregoinging statement contains the names of all of the creditors of said ....., the vendor, to whom the vendor is indebted, for or on account of any goods, wares or merchandise, and/or fixtures and equipment, used in and about the business of the vendor, purchased upon credit, or for or on account of money borrowed to carry on the business of the vendor, of which the goods, wares and merchandise, and/or fixtures and equipment, bargained for or purchased, are a part, together with their addresses, and that the amounts set opposite the names of said creditors are the correct amounts now due and owing and which shall become due and owing by said ....., the vendor, to such creditors respectively; that there are no creditors holding claims for or on account of any goods, wares or merchandise, and/or fixtures and equipment, so purchased upon credit, or for or on account of money so borrowed, to carry on the business of the vendor, due or to become due from said vendor, other than as set forth in said statement; and that the matters set forth in said statement and in this affidavit are within my personal knowledge.

"..... [34]

"Subscribed and sworn to before me this .... day of ....., 19..

"....,

"Title of Officer Taking Oath.

"The verified statements above provided for shall be made in duplicate and the vendee shall file one of such statements in the office of the county auditor of the county in which the stock and/or fixtures proposed to be purchased are situated, at least five days before the consummation of such purchase and the same shall be indexed as chattel mortgagers are indexed, the name of the vendor being indexed as mortgagor and the name of the intending purchaser as mortgagee.

"Sec. 5833. Part payment of purchase price—Application to creditors' claims—Failure to file—Written waiver by creditors. Whenever any person shall bargain for, or purchase, all or substantially all of any stock of goods, wares or merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business of the vendor, in bulk, for cash or credit, and shall pay any part of the purchase price, or execute, or deliver to the vendor thereof, or to his order, or to any person for his use, and promissory note or other evidence of indebtedness for said purchase price, or any part thereof, without first having demanded and received from said vendor or from his agent, the statement provided for in section 5832, verified as therein provided, and without applying or causing to be applied such purchase price pro rata to the

payment of the bona fide claims of the creditors of the vendor as shown upon such verified statement, and without filing the verified statement in the office of the county auditor at least five days [35] before the consummation of the purchase as provided in the preceding section, such sale, or transfer, shall be fraudulent and void as to creditors of the vendor, of the character specified in section 5832: Provided, that if such vendor produces and delivers a written waiver of the provisions of this act, from his creditors, as shown by such verified statements, then, in that case, the provisions of this section shall not apply.

"Sec. 5834. False statement as to creditors—Liabilities in perjury. Any vendor of all or substantially all of any stock of goods, wares or merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business of the vendor, sold or transferred in bulk, or any other person who is acting for or in behalf of such vendor, who shall knowingly or willfully make or deliver, or cause to be made or delivered, a statement as provided for in section 5832, which shall not include the names of all of the creditors of such vendor, of the character specified in section 5832, together with their addresses, and the correct amounts due, and to become due each of them respectively, or which shall contain any false statement, shall be deemed guilty of perjury.

"Sec. 5835. Sale and transfer in bulk defined—Judicial sales excepted. Any sale, exchange or trans-

fer, or attempted exchange or transfer, of all or substantially all of any stock of goods, wares or merchandise, and/or all or substantially all of the fixtures and equipment used in and about the business of a vendor engaged in the business of buying and selling and dealing in goods, wares or merchandise, of any kind or description, made out of the usual and ordinary course of business of [36] the vendor, or the sale, exchange or transfer, or attempted sale, exchange or transfer of substantially the entire business of buying, selling and dealing in goods, wares or merchandise conducted by the vendor, or the sale, exchange or transfer, or attempted sale, exchange or transfer, of the interest of the vendor in any such business, shall be deemed a sale and transfer in bulk, in contemplation of this act: Provided, that nothing contained in this act shall apply to sales or transfers of property by executors, administrators, receivers, or public officers, acting under judicial process.

"Sec. 5836. Act not to apply to executors, etc. Re-enacted as part of Sec. 5835, supra."

Duly verified.

[Endorsed]: Filed October 18, 1954. [37]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT AND COUNTERCLAIM

In answer to the First Cause of Action of plaintiff's complaint, defendants admit, deny and allege as follows:

I.

Referring to Paragraph II of plaintiff's first cause of action, defendants admit that Autrey Brothers, Inc., was and still is a corporation organized and existing under and by virtue of the laws of the State of California; that substantially all of the capital stock of Autrey Brothers, Inc., was owned and controlled by the defendants Lewis Autrey and Stella Autrey, but allege that said capital stock is no longer owned and controlled by the defendants Lewis Autrey and Stella Autrey; that Lewis Autrey and Stella Autrey are husband and wife; except as expressly admitted defendants deny each and every allegation therein [39] contained.

II.

Referring to Paragraph III of plaintiff's first cause of action, defendants admit that this action is brought by plaintiff under the provisions of Section 67 (d), 67 (e) and 70 (e) of the National Bankruptcy Act and the Bulk Sales Laws of the States of California, Oregon, Washington and Utah, and the purpose thereof; except as expressly admitted, defendants deny generally and specifically each and every allegation contained in said paragraph.

III.

Referring to Paragraph IV of plaintiff's first cause of action defendants deny that the bankrupt, Veraco, Inc., purchased and dealt with merchandise on credit; except as expressly denied, defendants admit each and every allegation contained in said paragraph.

IV.

Referring to Paragraph IV of plaintiff's first cause of action defendants deny that the stock in trade belonging to the retail stores mentioned in said paragraph was owned by Veraco, Inc.; defendants deny that the transfer complained of was not in the regular course of business, but allege that said transfers was in fact made in the ordinary and regular course of business; that defendants further deny that said transfer required compliance with Section 3440 of the Civil Code of California; except as expressly denied, defendants admit each and every allegation contained in said paragraph.

V.

Referring to Paragraph VI of plaintiff's first cause of action defendants have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

VI.

Referring to Paragraph VII of plaintiff's first cause of action defendants deny generally and specifically each and every [40] allegation therein contained and the whole thereof.

VII.

Referring to Paragraph VIII of plaintiff's first cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VIII.

Referring to Paragraph IX of plaintiff's first cause of action defendants admit each and every allegation therein contained except that they deny that the plaintiff herein is the duly elected, qualified and acting Trustee in Bankruptcy for the Estate of Veraco, Inc.

Answering Plaintiff's Second Cause of Action Herein Defendants Admit, Deny and Allege as Follows:

I.

Referring to Paragraph I of plaintiff's second cause of action defendants answer said paragraph in the same manner and with the same force and effect as they answered Paragraphs I, II, III, and IX of plaintiff's first cause of action, as though fully set forth herein again.

II.

Referring to Paragraph II of plaintiff's second cause of action defendants deny that the bankrupt, Veraco, Inc., purchased and dealt with merchandise on credit; except as expressly denied, defendants admit each and every allegation contained in said paragraph.

III.

Referring to Paragraph IV of plaintiff's second cause of action defendants deny that the transfer

complained of was not made in the ordinary and regular course of business, but allege that said transfer was in fact made in the ordinary and regular course of business; except as expressly denied, defendants admit each and every allegation therein contained. [41]

IV.

Referring to Paragraph V of plaintiff's second cause of action defendants allege that they have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

V.

Referring to Paragraph VI of plaintiff's second cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VI.

Referring to Paragraph VII of plaintiff's second cause of action defendants admit all of said paragraph except that defendants deny said transfer was fraudulent and void or is fraudulent and void as to plaintiff herein.

Answering Plaintiff's Third Cause of Action Herein Defendants Admit, Deny and Allege as Follows:

I.

Referring to Paragraph I of plaintiff's third

cause of action defendants answer said paragraph in the same manner and with the same force and effect as they answered Paragraphs I, II, III and IX of plaintiff's first cause of action as though fully set forth herein again.

II.

Referring to Paragraph II of plaintiff's third cause of action defendants deny that the bankrupt Veraco, Inc., purchased and dealt with merchandise on credit; except as expressly denied defendants admit each and every allegation contained in said paragraph.

III.

Referring to Paragraph III of plaintiff's third cause of action defendants deny that the transfer complained of was not in the regular course of business, but allege that said transfer was in fact made in the ordinary and regular course of business; except as [42] expressly denied, defendants admit each and every allegation contained in said paragraph.

IV.

Referring to Paragraph V of plaintiff's third cause of action defendants allege that they have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

V.

Referring to Paragraph VI of plaintiff's third cause of action defendants deny generally and spe-

cifically each and every allegation therein contained and the whole thereof.

VI.

Referring to Paragraph VII of plaintiff's third cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

Answering Plaintiff's Fourth Cause of Action Herein Defendants Admit, Deny and Allege as follows:

I.

Referring to Paragraph I of plaintiff's fourth cause of action defendants answer said paragraph in the same manner and with the same force and effect as they answered paragraphs I, II, III and IX of plaintiff's first cause of action, as though fully set forth herein again.

II.

Referring to Paragraph II of the fourth cause of action, defendants deny that the bankrupt, Veraco, Inc., purchased and dealt with merchandise on credit; except as expressly denied defendants admit each and every allegation contained in said paragraph.

III.

Referring to Paragraph III of plaintiff's fourth cause of [43] action, defendants admit each and every allegation therein contained except that defendants deny that the value of the stock in trade,

fixtures and equipment was the sum of $18,727.55; Defendants further deny that the transfer complained of was not in the ordinary and regular course of business and allege that said transfer was in fact made in the ordinary and regular course of business.

IV.

Referring to Paragraph IV of plaintiff's fourth cause of action defendants admit each and every allegation there contained except that defendants deny said transfer was fraudulent and void as to creditors of the vendor and deny that said transfer is null and void as to plaintiff herein and further deny that any such statements were required by Section 5832 or any other section of the Washington Bulk Sales Law.

V.

Referring to Paragraph V of plaintiff's fourth cause of action defendants allege that they have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

Answering Plaintiff's Fifth Cause of Action Herein Defendants Admit, Deny and Allege as follows:

I.

Referring to Paragraph I of plaintiff's fifth cause of action defendants reassert each and every admission, denial and allegation of defendants' an-

swer to plaintiff's first, second, third and fourth causes of action and incorporate the same as though fully set forth herein again.

II.

Referring to Paragraph II of plaintiff's fifth cause of action defendants deny that they took possession of or collected the accounts receivable referred to in said paragraph; that defendants have insufficient information and belief to determine whether profits [44] were made from the operation of said places of business and placing their denial on that ground deny generally and specifically said allegation.

III.

Referring to Paragraph III of plaintiff's fifth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

Answering Plaintiff's Sixth Cause of Action Herein Defendants Admit, Deny and Allege as follows:

I.

Referring to Paragraph I of the sixth cause of action defendants reassert each and every admission, denial and allegation of defendants' answer to plaintiff's first, second, third and fourth causes of action and incorporate the same as though fully set forth herein again.

II.

Referring to Paragraph II of plaintiff's sixth cause of action defendants deny generally and spe-

cifically each and every allegation therein contained; except that defendants admit the defendant Lewis Autrey was an officer and director of Autrey Brothers, Inc., on November 5, 1953, and November 16, 1953.

III.

Referring to Paragraph III of plaintiff's sixth cause of action defendants deny each and every allegation contained therein except that defendants admit that defendant Lewis Autrey was authorized to sign and draw checks on a bank account of the bankrupt located at the Bank of America, Westchester Branch, Los Angeles, California.

IV.

Referring to Paragraph IV of plaintiff's sixth cause of action, defendants deny generally and specifically each and every allegation therein contained except that defendants admit that the bankrupt Veraco, Inc., was a sales outlet of defendant Autrey Brothers, Inc. [45]

V.

Referring to Paragraph V of plaintiff's sixth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VI.

Referring to Paragraph VI of plaintiff's sixth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VII.

Referring to Paragraph VII of plaintiff's sixth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

VIII.

Referring to Paragraph VIII of plaintiff's sixth cause of action defendants deny generally and specifically each and every allegation therein contained and the whole thereof.

IX.

Referring to Paragraph IX of plaintiff's sixth cause of action defendants allege that they have insufficient information or belief on the subject sufficient to enable them to answer the allegations of said paragraph and placing their denial on that ground deny generally and specifically each and every allegation therein.

And for a Second, Separate and Affirmative Defense to the First, Second, Third, Fourth, Fifth and Sixth Causes of Action Stated by Plaintiff, Defendants Allege as follows:

I.

That on or about the 15th day of June, 1952, it was agreed by and between Vernon W. Autrey on behalf of the bankrupt Veraco, Inc., and Lewis B. Autrey on behalf of defendant Autrey Brothers, Inc., that said defendant would furnish goods,

wares and merchandise to said bankrupt on consignment for sale to the public. [46]

II.

That defendant furnished to the bankrupt all goods, wares, and merchandise used and sold by said bankrupt prior to November 5, 1953, except for certain minor accessories; that said bankrupt was to pay for the goods, wares and merchandise so furnished by defendant by depositing the proceeds of each and every retail sale in a bank account maintained at the Bank of America, Westchester Branch, Los Angeles, California, Lewis B. Autrey to have the power to withdraw funds from that bank account in order to compensate Autrey Brothers, Inc., for the cost of the goods, wares and merchandise consigned to and sold by the bankrupt.

III.

That said bankrupt sold said consigned goods, wares and merchandise to the public at a profit, but did not deposit said proceeds in said bank account nor compensate said Autrey Brothers, Inc., for said sold goods; that on the 5th day of November, 1953, the bankrupt was indebted to defendants in excess of the sum of $95,000.00.

IV.

That on or about November 5, 1953, Veraco, Inc., Vernon W. Autrey and defendants entered into a written contract, a copy of which is attached hereto, marked "Exhibit A" and incorporated herein by reference; that on or about November 16, 1953, the

bankrupt, Vernon W. Autrey and defendants entered into a supplemental agreement which amended and supplemented the agreement of November 5, 1953, a copy of which is attached hereto, marked "Exhibit B" and incorporated herein by way of reference.

V.

That the defendants, and each of them, have at all times done and performed all of the stipulations, conditions and agreements stated in said contract to be performed on their part at the time and in the manner therein specified. [47]

VI.

That the goods, wares and merchandise remaining in each and every retail outlet transferred pursuant to said agreement were on consignment thereto; that title to said goods, wares and merchandise remained in and was in Autrey Brothers, Inc., at the time of said transfer.

VII.

That by reason of the premises said transfers are not subject to the Bulk Sales Acts of the States of Oregon, Washington, Utah and California as charged by plaintiff in his complaint; that said transfers were not and are not fraudulent and void, under said acts nor under Section 67(d) of the National Bankruptcy Act.

And for a Third, Separate and Affirmative Defense to Plaintiff's First, Second, Third, Fourth and Fifth Causes of Action, Defendants Allege as follows:

I.

Defendants incorporate allegations I, II, III, IV, V and VI of their second affirmative defense as though fully set forth herein again.

II.

That the bankrupt, acting through its president, Vernon W. Autrey, fraudulently concealed and diverted the funds due to Autrey Brothers, Inc., as consignor from the sale of said consigned merchandise; that the defendant Autrey Brothers, Inc., continued to consign goods, wares and merchandise to the said bankrupt during the time period in which said diversion was taking place.

III.

That by virtue of Section 2224 of the Civil Code of the State of California and by force of law the said diversion constituted the bankrupt the involuntary or constructive Trustee of said funds, and all other assets of said bankrupt for the benefit of the defendants and constituted the defendants the equitable owner thereof. [48]

IV.

That a transfer of property to the equitable owner thereof is not in violation of the Bulk Sales Acts of the States of Oregon, Washington, Utah and California.

And for a Fourth, Separate and Affirmative Defense to Plaintiff's First, Second, Third, Fourth and Fifth Causes of Action, Defendants Allege as follows:

I.

That the defendants obtained the transfers alleged by plaintiff to be fraudulent in good faith without notice and for a valuable consideration.

II.

That the Times-Mirror Company alleged by plaintiff to be the creditor whose rights plaintiff is exercising under Section 70(e) of the National Bankruptcy Act had knowledge of and acquiesced in said transfer.

III.

That in reliance upon the knowledge and acquiescence of said Times-Mirror Company in said transfer defendants expended sums they otherwise would not have, in improving upon the subjects which plaintiff alleges to have been fraudulently conveyed.

IV.

That by reason of said knowledge and acquiescence of the Times-Mirror Company and by reason of said reliance by defendants plaintiff is estopped from asserting the invalidity of said transfers.

And for a Fifth, Separate and Affirmative Defense to Plaintiff's First, Second, Third, Fourth, and Fifth Causes of Action, Defendants Allege as follows:

I.

Defendants incorporate allegations I, II, III, IV, V and VI of their second affirmative defense as though fully set forth again. [49]

II.

That in accordance with said supplemental agreement dated November 16, 1953, and in particular Paragraph IV thereof referring to the balance of monies due to defendants; said defendants attempted and requested the bankrupt and Vernon W. Autrey to meet with them for the purpose of making an accounting to determine the balance due them, the defendants, under said contract and the bankrupt and Vernon W. Autrey failed and refused to meet for the purpose of making such accounting.

III.

That accordingly on January 6, 1954, defendants made an accounting and determined that said sum due to them under the terms of "Exhibit A" and "Exhibit B" is $54,962.28.

IV.

That said sum was due, owing and unpaid at the time Veraco, Inc., was adjudged bankrupt and is still due, owing and unpaid.

V.

That the defendants are informed and believe and on the basis of such information and belief alleged that the defendants are the largest creditors of the bankrupt; that as such the defendants were entitled to the notice prescribed by the terms of Section 58(a) (3) of the National Bankruptcy Act.

VI.

That the first meeting of creditors of the bankrupt was held August 30, 1954, at which time the plaintiff herein was elected Trustee; that the defendants were not given the notice required under Section 58(a) of the National Bankruptcy Act of said meeting.

VII.

That by reason of the said failure to give defendants said notice the actions taken at said meeting in electing plaintiff Trustee were null and void and of no force or effect. [50]

VIII.

That by reason of the premises the plaintiff herein lacked capacity to commence and lacks capacity to prosecute this action.

And for a Sixth, Separate and Affirmative Defense to Plaintiff's Second, Third, Fourth and Fifth Causes of Action, Defendants Allege as follows:

I.

Defendants incorporate allegations I, II, III, IV and V of their second affirmative defense as though fully set forth herein again.

II.

That the transfer made pursuant to said agreements constitute a preference by Veraco, Inc., to its creditors, the defendants herein, and that said preference does not constitute a fraudulent conveyance under the Bulk Sales Act of the States of Oregon, Washington and Utah.

And for a Seventh, Separate and Affirmative Defense to Plaintiff's Fourth and Fifth Causes of Action, Defendants Allege as follows:

I.

Defendants incorporate allegations I, II, III, and IV of their second affirmative defense as though fully set forth herein again.

II.

That defendants are informed and believe and based upon such information and belief allege that the Times-Mirror Company, the creditor whose rights plaintiff is exercising under Section 70(e) of the National Bankruptcy Act, rendered services as distinguished from the furnishing of goods, wares and merchandise, to the bankrupt.

III.

That said Times-Mirror Company is not a creditor protected under the terms of the Bulk Sales Laws of the States of Washington, Oregon, Utah and California. [51]

And for an Eighth, Separate and Affirmative Defense to Plaintiff's First, Second, Third, Fourth, Fifth and Sixth Causes of Action, Defendants Allege as follows:

I.

That defendants are informed and believe and based upon such information and belief allege that at all times since the month of December, 1949, the bankrupt, Veraco, Inc., has been and still is a corporation organized and existing under and by virtue of the laws of the State of California, and that substantially all, if not all, of the capital stock of Veraco, Inc., was and is owned and controlled by Vernon W. Autrey, who at all times mentioned herein was and is an officer and director of said bankrupt.

II.

That defendants are informed and believe and based upon such information and belief allege that the said bankrupt in such a way and manner as to the said bankrupt in such a way and maner as to constitute said corporation his, the said Vernon W. Autrey's, alter ego.

III.

That defendants are informed and believe and based upon such information and belief allege that if said Vernon W. Autrey is made liable for the debts of said bankrupt, the assets of said bankrupt's Estate will exceed its liabilities.

IV.

That by reason of said dealing the personal assets of said Vernon W. Autrey, ought, in fairness and in equity, to be applied to the payment of the debts of the bankrupt, Veraco, Inc., before the Estate of said bankrupt attempts to enforce alleged causes of action against the defendants herein.

And for a Ninth, Separate and Affirmative Defense to Plaintiff's Sixth Cause of Action, Defendants allege as follows: [52]

I.

That if the transfers complained of by plaintiff were fraudulent under the provisions of Section 67(d) of the National Bankruptcy Act, defendants allege that said defendants were and are good faith bona fide purchasers of the assets transferred for a present fair equivalent value.

II.

That if the consideration given by defendants is determined to be less than fair, said defendants allege their right to retain the property so transferred as security for repayment as provided in Section 67(d) (6) of the National Bankruptcy Act.

Counter-Claim

For counter-claim against plaintiffs, defendants complain and allege:

I.

Defendants incorporate Paragraphs I, II, III,

IV, V, and VI of the second affirmative defense as though fully set forth herein again.

II.

That there is now due, owing and unpaid to defendants, the sum of $54,962.28, from the bankrupt, Veraco, Inc.

Wherefore, defendants pray:

1. That plaintiff take nothing by his action;

2. That defendants be awarded their costs of suit;

3. That the bankrupt, Veraco, Inc., be declared the alter ego of Vernon W. Autrey and that said Vernon W. Autrey be made liable for the debts and liabilities of said bankrupt;

4. For judgment against the said Veraco, Inc., and its alter ego, Vernon W. Autrey, in the sum of $54,962.28, together with interest from the due date therein; and [53]

5. For such other and further relief as to the Court seems just and proper.

ZEMAN, HERTZBERG &
SCHEKMAN,

By /s/ [Indistinguishable],
Attorneys for Defendants.

EXHIBIT "A"

Memorandum Agreement

November 5, 1953.

Lewis Autrey and Vernon Autrey hereby agree as follows:

1. Each releases the other from the interest that each has or may have in the businesses known as Autrey Bros., Inc., dba Sleep E Z Mattress Co. and Veraco, Inc.

2. Vernon Autrey hereby agrees to deliver the possession to Lewis Autrey the following stores as of November 9, 1953:

(a) 2039 W. Pico, Los Angeles.
(b) 17113 Bellflower Blvd., Bellflower.
(c) 11950 E. Garvey Blvd., El Monte.
(d) 850 S. Main St., Salt Lake City.

(this as soon as possible but not later than November 15, 1953.)

3. Vernon Autrey hereby agrees that he is indebted to Lewis Autrey in the sum of approximately $95,000.00.

4. Lewis Autrey agrees to credit Vernon Autrey with the book value of merchandise contained in the above stores, including trucks and equipment at fair market value.

5. The balance, if any, to be paid in the following manner: $7,000.00 by Nov. 10, '53; $7,000.00 by Nov. 16, '53; $7,000.00 by Nov. 21, '53.

6. The balance, if any, to be paid in twelve equal monthly payments.

7. Vernon Autrey to discontinue the use of the name Sleep E Z Mattress Co. within six months of this date.

8. Vernon Autrey to pay all bills incurred as to each store as of the date of delivery of possession.

9. Wherever the name Vernon Autrey appears herein the name Veraco, Inc., is likewise included.

VERNON W. AUTREY.

As to leases on the stores mentioned, Lewis Autrey agrees to save and hold harmless Vernon Autrey as to any future liability.

Likewise, wherever the name Lewis Autrey appears herein the name of Autrey Bros., Inc., dba Sleep E Z Mattress Co. is included.

All parties hereto hereby agree not to molest each other or cause any trouble for each other.

All bills that may be due in any of the stores incurred by Vernon Autrey must be paid by him.

Dated at Santa Monica this 5th day of November, 1953.

/s/ LEWIS B. AUTREY,

/s/ VERNON W. AUTREY.

Witnessed by:

SAMUEL SCHEKMAN,

ROBERT SILVER. [55]

EXHIBIT "B"

Supplemental Agreement

November 16th, 1953.

Supplementing agreement entered into on November 5, 1953, by and between the parties signatory hereto, it is agreed as follows:

1. That in addition to the stores enumerated in paragraph (2) of the agreement of November 5th, 1953, the following stores shall be included:

e. 2800 N. E. Sandy Blvd., Portland, Oregon.
f. 5311 S. Tacoma Way, Tacoma, Washington.
g. 7808 Aurora Blvd., Seattle, Washington.

2. Lewis B. Autrey agrees to credit Vernon W. Autrey with the following, in addition to credits agreed upon in paragraph (4) of the agreement of November 5th, 1953;

Prepaid Rents	$ 1,100.00
Signs	1,500.00
Equity in Trucks	3,000.00
Covers for Trucks	500.00
Utility Deposits	200.00
Reserves with Finance Co.	5,000.00
Inventory in Stores	24,000.00

Provided, however, that the figures may be adjusted to conform to actual figures determined upon the taking of physical inventory at book value, and the verification of the utility deposits and reserves with

the finance companies. All the other figures are agreed upon.

3. Lewis B. Autrey agrees to pay all bills now due for advertising, current taxes, payroll and operating expenses and to deduct said payments from the credit determined as above. Contingent taxes from past operations shall be paid by Vernon W. Autrey.

4. In consideration of the above, the said Vernon W. Autrey shall not be required to make any further payments as provided for in paragraph (5) of the agreement of November 5th, 1953, but the balance if any, shall be paid in 12 equal monthly installments as provided in paragraph (6) of said agreement. Said payments to start 30 days after agreement between the parties of the correctness of the final statement. [56]

5. Paragraph (8) of the agreement dated November 5th, 1953, shall not apply as to the three stores herein enumerated.

6. In all other respects the agreement entered into on November 5th, 1953, shall be and remain in full force and effect.

Dated at Beverly Hills, California, this 16th day of November, 1953.

/s/ LEWIS B. AUTREY,

/s/ VERNON W. AUTREY.

Witnessed by:

/s/ ROBERT SILVER,

/s/ HARRY TRAUB.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed December 6, 1954. [57]

[Title of District Court and Cause.]

AMENDED AND SUPPLEMENTAL COMPLAINT

The plaintiff for his cause of action, leave having first been obtained to file an amended and supplemental complaint joining Sleep E-Z Mattress Co., a California corporation, as an additional party defendant, complains of the defendants and alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in his First to Sixth Cause of Action, inclusive, as set forth in the plaintiff's original complaint, and makes them and each of them a part hereof by reference to the same extent and with the same effect as though each and every one of said causes of action were specifically set [61] forth herein.

II.

That at all times subsequent to October 19, 1954, the defendant Sleep E-Z Mattress Co., was, since

has been and still is a corporation organized and existing under and by virtue of the laws of the State of California, and that all of the capital stock in said defendant Sleep E-Z Mattress Co. is owned and controlled by the defendants Autrey Brothers, Inc., Lewis Autrey and Stella Autrey.

III.

That the defendant Sleep E-Z Mattress Co. was incorporated by the defendants, Autrey Brothers, Inc., Lewis Autrey and Stella Autrey, after the above-entitled action had been filed in this Court and summons issued, and that said defendant Sleep E-Z Mattress Co. is wholly owned and controlled by the defendants Autrey Brothers, Inc., Lewis Autrey and Stella Autrey, and the actual management of its business is under the domination and control of the defendant Lewis Autrey, who is also known as Buster Autrey.

IV.

That the defendant Lewis Autrey was subpoenaed to give his deposition in the above-entitled action at the office of Craig, Weller & Laugharn, 817, 111 West 7th Street, Los Angeles, California, on December 15, 1954, at the hour of 10:00 a.m. on said date; that at the request of the defendants, the taking of said deposition was continued to December 22, 1954, at 10:00 a.m.

V.

That said deposition was partially taken on December 22, 1954, and was adjourned to January 6,

1955, for the purpose of giving the defendant Lewis Autrey an oportunity to produce certain records which he did not have with him on December 22, 1954; that during the recess in the taking of said deposition, [62] the defendants herein, Autrey Brothers, Inc., Lewis Autrey and Stella Autrey, caused a transfer to be made of all of the retail stores set forth in the original complaint filed herein to Sleep E-Z Mattress Co. entirely without consideration, and with the intent and purpose on the part of said defendants and said Sleep E-Z Mattress Co. to hinder, delay or defraud creditors of the bankrupt, Veraco, Inc., and the plaintiff herein as Trustee in bankruptcy for its bankrupt estate, and for the purpose of rendering any judgment obtained by the plaintiff herein against said defendants Autrey Brothers, Inc., Lewis Autrey and Stella Autrey ineffective; that said transfer of said retail outlets was made on or about January 1, 1955, and was made pursuant to a conspiracy, confederation and common design on the part of the defendants, Autrey Brothers, Inc., Lewis Autrey and Stella Autrey and the Sleep E-Z Mattress Co. to hinder, delay or defraud the plaintiff herein and the creditors of Veraco, Inc.

And for a Second and Separate Cause of Action as Amended, Plaintiff Alleges:

I.

That he reiterates and restates each and every allegation, statement and charge contained in the

first cause of action in this amended complaint, and makes them a part hereof by reference.

II.

That further pursuant to the conspiracy, confederation and common design set forth in plaintiff's amended complaint, the defendants Lewis Autrey, Stella Autrey and Autrey Brothers, Inc., caused the home situated in the County of Los Angeles, State of California, owned by the defendants Lewis Autrey and Stella Autrey, on which they had a homestead declaration in the amount [63] of $12,500.00, and which was encumbered by a trust deed in the sum of $2,500.00, to be further encumbered by borrowing $5,000.00 in cash thereon, and placing a subsequent trust deed thereon, and borrowed the additional sum of $30,000.00 on real property owned and controlled by the defendant Autrey Brothers, Inc., and concealed or secreted the cash derived from said loans, all for the purpose of rendering said defendants proof against execution to enforce any judgment which might be obtained by the plaintiff herein against them, the said defendants.

III.

That plaintiff fears that unless a Receiver is appointed to take possession of the assets of the defendants herein, said defendants will further encumber, dissipate or otherwise dispose of the assets belonging to them or to the Sleep E-Z Mattress Co., Inc., for the purpose of rendering any judg-

ment which this Court might make, empty and ineffectual.

Wherefore, plaintiff prays judgment against the defendants and each of them as follows:

1. On the first cause of action for the sum of $20,346.03, together with interest on said sum from November 5, 1953, at 7% per annum.

2. On the second cause of action for the sum of $15,395.36, with interest on said sum from November 5, 1953, at 7% per annum.

3. On the third cause of action for the sum of $21,846.68, together with interest on said sum from November 16, 1953, at 7% per annum.

4. On the fourth cause of action for the sum of $18,727.55 at the rate of 7% per annum from November 16, 1953, at the rate of 7% per annum.

5. On the fifth cause of action, that in the event judgment is rendered in favor of the plaintiff, an accounting be [64] had between the plaintiff and defendants herein, and a Master be appointed to take such account and ascertain the amount due plaintiff from the defendants herein under such accounting, and that the plaintiff have and recover judgment against the defendants for the amount of such accounting.

6. On the sixth cause of action, for judgment against the defendants for the sum of $76,315.62, together with interest on said sum from November 16, 1953, at 7% per annum.

7. On the first cause of action of plaintiff's amended and supplemental complaint, that the transfers set forth in Paragraph V of said amended supplemental complaint be decreed to be null and void, and of no force and effect as against creditors of Veraco, Inc., and the plaintiff as Trustee in bankruptcy of its bankrupt estate, and by reason of the fraudulent conduct on the part of the defendants herein, the plaintiff be awarded punitive damages in the sum of $10,000.00 against the defendants and each of them, under the provisions of Section 3294 of the Civil Code of California.

8. On the plaintiff's second and separate cause of action as amended, a Receiver be appointed by order of this Court to take possession of the places of business transferred to the defendant Sleep E-Z Mattress Co., by the defendants Autrey Brothers, Inc., Lewis Autrey and Stella Autrey to preserve the same against further fraudulent transfers and other dispositions by said defendants.

9. That the plaintiff have such other and further relief as the Court may deem just and equitable in the premises, and that he have and recover his costs and disbursements herein.

BUCHALTER, NEMER & FIELDS AND
CRAIG, WELLER & LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Plaintiff.

Duly verified.

Lodged February 9, 1955.

[Endorsed]: Filed March 2, 1955. [65]

[Title of District Court and Cause.]

ANSWER TO AMENDED AND SUPPLEMENTAL COMPLAINT

Comes now the defendant Sleep E-Z Mattress Co., a California corporation and answering plaintiff's amended and supplemental complaint on file herein admits, denies and alleges as follows, to wit:

I.

Answering the allegations of Paragraph I of said amended and supplemental complaint, this defendant denies generally and specifically each, every, all and singular the allegations in said paragraph contained and does hereby incorporate herein by reference the answer of the other defendants to the first to sixth causes of action, inclusive, as set forth in the answer of the other defendants and makes said answer a part hereof by reference to the same extent and with the same legal force and effect as though each and every one of said answers were specifically set forth herein. [67]

II.

Answering the allegations of Paragraph II of said amended and supplemental complaint, other than admitting the incorporation of Sleep E-Z Mattress Co., on October 19, 1954, this defendant denies generally and specifically each, every, all and singular the other allegations in said paragraph contained.

III.

Answering the allegations of Paragraph III of said amended and supplemental complaint, this de-

fendant is without sufficient knowledge, information or belief to enable it to answer the allegations of said paragraph and placing its denials upon said ground, denies generally and specifically each, every, all and singular the allegations in said paragraph contained.

IV.

Answering the allegations of Paragraphs IV and V of said amended and supplemental complaint, this defendant is without sufficient knowledge or information to enable it to answer the allegations of said paragraphs and based upon said lack of knowledge, this defendant denies generally and specifically each, every, all and singular the allegations contained in said paragraphs IV and V.

Answering Plaintiff's Alleged Second and Separate Cause of Action, This Defendant Admits, Denies and Alleges as follows, to wit:

I.

Denies generally and specifically each, every, all and singular the allegations contained in Paragraph I of said second alleged cause of action.

II.

Denies generally and specifically each, every, all and singular the allegations set forth in Paragraph II of said second alleged cause of action.

III.

Denies generally and specifically each, every, all and singular the allegations contained in Paragraph III of said second alleged cause of action.

Wherefore, this defendant prays that plaintiff take nothing by his [68] complaint herein and that this defendant may be hence dismissed, together with judgment for its costs and disbursements of suit herein incurred.

/s/ BERTRAM H. ROSS,
Attorney for Defendant Sleep E-Z Mattress Co., a California Corporation.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed March 22, 1955. [69]

In the District Court of the United States,
Southern District of California, Central Division
Civil No. 17354-TC

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., dba Airest Mattress Co., Bankrupt,

Plaintiff,

vs.

AUTREY BROTHERS, INC., LEWIS AUTREY, STELLA AUTREY and SLEEP E-Z MATTRESS CO., a California Corporation,

Defendants.

JUDGMENT AND DECREE FOR PLAINTIFF ON PLAINTIFF'S AMENDED AND SUPPLEMENTAL COMPLAINT

The above-entitled action coming on for hearing before the undersigned Judge of the above-named

Court on January 11, 1956, at 10:00 a.m. on said date, pursuant to notice, the plaintiff appearing in person and by his attorneys, Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and Buchalter, Nemer & Fields, Murray M. Fields of counsel, and the defendants Autrey Brothers, Inc., Lewis Autrey, Stella Autrey and Sleep E-Z Mattress Co., appearing by their attorney, Bertram H. Ross, and testimony having been taken and evidence having been received, and the Court being fully advised in the premises, finds:

That the bankrupt, Veraco, Inc., was and now is a corporation organized and existing under and by virtue of the [76] laws of the State of California, and doing business in Los Angeles County, State of California, and elsewhere, as Veraco, Inc., also doing business as Airest Mattress Co.

That at all times herein mentioned, the defendant Autrey Brothers, Inc., was and is a corporation organized and existing under and by virtue of the laws of the State of California, and that all, or substantially all, of the capital stock of Autrey Brothers, Inc., was and is owned and controlled by the defendants Lewis Autrey and Stella Autrey who were and are husband and wife, and who were and are officers and directors of the defendant Autrey Brothers, Inc.

The Court finds that on November 9, 1953, and for a long time prior thereto, the bankrupt Veraco, Inc., was engaged as a retail merchant selling mat-

tresses and other bedding equipment at retail at certain stores located at No. 2039 W. Pico Boulevard, Los Angeles, California; 17113 Bellflower Boulevard, Bellflower, California; 11950 E. Garvey Boulevard, El Monte, California, and with outlets outside of the State of California at No. 2800 N. E. Sandy Boulevard, Portland, Oregon; 5311 S. Tacoma Way, Tacoma, Washington; 7808 Aurora Boulevard, Seattle, Washington, and 850 South Main Street, Salt Lake City, Utah, and was purchasing and dealing with said merchandise on credit.

The Court further finds that in the States of California, Oregon, Washington and Utah, there were at all times herein mentioned certain statutes requiring acts either by publication or notice by registered mail to all creditors of a retail merchant of a proposed transfer of his stock in trade, or any substantial portion thereof, in order to make said proposed transfers valid as against existing creditors, and that in none of the instances of the transfers hereinafter described were any of said Bulk Sales Laws attempted to be complied with by the defendants herein, or any of them. [77]

The Court further finds that on November 9, 1953, the bankrupt, Veraco, Inc., transferred to the defendants Lewis Autrey and Autrey Brothers, Inc., the entire stock, fixtures, equipment and trucks belonging to the retail stores owned and operated by said bankrupt, Veraco, Inc., located at No. 2039

W. Pico Boulevard, Los Angeles, California; 17113 Bellflower Boulevard, Bellflower, California; 11950 E. Garvey Boulevard, El Monte, California, and 850 S. Main Street, Salt Lake City, Utah, in response to certain threats made by the defendant Lewis Autrey on behalf of Autrey Brothers, Inc., against the president of the bankrupt corporation, Veraco, Inc., to falsely accuse him, the said Vernon Autrey, of embezzlement and misappropriation of funds belonging to Autrey Brothers, Inc., and to cause a criminal prosecution to be instituted against him in the State of California; that acting under duress and over night, and without compliance with the provisions of Section 3440 of the Civil Code of California insofar as the California stores were concerned, or with Title 25, Chap. 2, Sec. 1 of the Utah Bulk Sales Law, and with the intent and purpose on the part of the bankrupt Veraco, Inc., to hinder, delay or defraud its creditors both present and future, said bankrupt transferred the retail outlets hereinbefore described to the defendants Autrey Brothers, Inc., and Lewis Autrey.

The Court further finds that on November 16, 1953, the bankrupt Veraco, Inc., likewise transferred retail outlets located at No. 2800 N. E. Sandy Boulevard, Portland, Oregon; 5311 S. Tacoma Way, Tacoma, Washington, and 7808 Aurora Boulevard, Seattle, Washington, to the defendants Autrey Brothers, Inc., and Lewis Autrey, and that at the time that all of said transfers were effectu-

ated the bankrupt was indebted to and continuously since said transfers has been indebted to the Times-Mirror Co. of Los Angeles, California, in the sum of $2,465.87, no part of [78] which has been paid.

The Court further finds that after the above-entitled action was at issue, the deposition of Lewis Autrey was taken at the office of Messrs. Craig, Weller & Laugharn, attorneys for the plaintiff, under the provisions of the Federal Rules of Civil Procedure, beginning on December 22, 1954; that at the onset of the taking of said deposition, the defendant Lewis Autrey testified that the merchandise transferred in accordance with the description in the plaintiff's complaint was merchandise in the bankrupt's place of business on consignment, and that he did not have the consignment agreements with him but could produce the same at an adjourned hearing of the taking of his deposition; that said deposition was accordingly recessed to January 6, 1955, to give the defendant Lewis Autrey an opportunity to produce said consignment agreements; that on or about the 1st day of October 19, 1954, while the suit herein was pending, the defendants Lewis Autrey and Stella Autrey had caused to be incorporated under the laws of the State of California, the defendant Sleep E-Z Mattress Co., which corporation had no assets and no issued capital stock; that during the recess in the taking of the deposition of Lewis Autrey, the defendant Lewis Autrey caused to be transferred

all of the heretofore fraudulently conveyed assets to the defendant Sleep E-Z Mattress Co., which thereupon made another transfer of the same to another corporation known as C.A.C. Corporation, which subsequently filed a petition in bankruptcy in the United States District Court for the Southern District of California, has been adjudicated a bankrupt and is now in the process of administration of this Court.

The Court further finds that by reason of the actions of the defendants herein in transferring assets of the bankrupt corporation from one corporation to another, owned and controlled by the defendants herein, creditors of Veraco, Inc., were hindered, [79] delayed, defrauded and damaged in the sum total of $76,315.62, and that by reason of the fraud practiced upon creditors of Veraco, Inc., the plaintiff is entitled to exemplary damages against the defendants under the provisions of Section 3294 of the Civil Code of California in the sum of $10,000.00.

The Court further finds that a decree seeking to avoid said transfers would be useless and fruitless inasmuch as the assets so transferred have now passed by operation of law to the Trustee in bankruptcy of the ultimate transferee, C.A.C. Corporation, which was not a party to the above-entitled action, and that the only relief than can be accorded to plaintiff herein is in the form of a money judgment against the defendants herein, without prejudice to the rights of the plaintiff herein to file and

assert a claim in the bankruptcy proceeding of the C.A.C. Corporation, bankrupt, based on this judgment.

That the Court further finds that no evidence was offered in support of defendants' counterclaim against the plaintiff herein.

The Court concludes that it has jurisdiction over the persons of the defendants herein under and by virtue of Section 70(e) of the National Bankruptcy Act, and Section 3439.01, et seq. of the Civil Code of California, Title 25, Chap. 2, Sections 1, 2, 3 and 4 of the Bulk Sales Law of the State of Utah, Sections 79.010, 10.020, 79.030 and 79.040 of the Revised Statutes of Oregon, and Title 37, Chap. 2, Sections 5832, 5833, 5834 and 5835 of Remington's Revised Statutes of Washington, to set aside and avoid the transfers hereinbefore complained of; and to grant such other and further relief as the Court may deem just and equitable in the event void transfers take place in violation of said Bulk Sales Laws.

The Court concludes that the plaintiff is entitled to judgment against the defendants, and each of them, in the sum [80] total of $86,315.62 actual and exemplary damages, together with interest on said sum at the rate of 7% per annum from the date of the filing of the above-entitled action, together with all of the plaintiff's costs and disbursements herein, to be taxed and allowed by the Clerk of this Court, and that judgment should be entered accordingly.

In consideration of the foregoing, and on motion of Messrs. Craig, Weller & Laugharn, Thomas S. Tobin of counsel, and Buchalter, Nemer & Fields, Murray M. Fields of counsel, it is

Ordered, Adjudged and Decreed, that the plaintiff have and recover judgment against the defendants, and each of them, in the sum of $86,315.62, together with interest on said sum from the date of the filing of the original complaint herein at the rate of 7% per annum, together with all of the plaintiff's costs and disbursements herein to be taxed and allowed by the clerk, and defendants' counterclaim to be denied.

Done at Los Angeles, in the Southern District of California, this 20th day of February, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

To the Defendants Above Named, and to Bertram H. Ross, Esq., Their Attorney:

Please Take Notice that on the 10th day of February, 1956, the undersigned attorneys for the plaintiff lodged the foregoing judgment and decree with Honorable Thurmond Clarke, United States District Judge, for signing. Unless you file written objections to the signing of the same within five (5) days after service of this notice upon you, the same will be signed and entered.

Dated: February 10, 1956.

CRAIG, WELLER &
LAUGHARN,

By /s/ THOMAS S. TOBIN,
Attorneys for Plaintiff.

Affidavit of service by mail attached.

Lodged February 13, 1956.

[Endorsed]: Filed and entered February 20, 1956. [81]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Autrey Brothers, Inc., Lewis Autrey, Stella Autrey and Sleep E-Z Mattress Co., a California corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 20th, 1956, and from the whole thereof.

Dated this 21st day of February, 1956.

/s/ BERTRAM H. ROSS,
Attorney for Appellants, Autrey Brothers, Inc., Lewis Autrey, Stella Autrey and Sleep E-Z Mattress Co., a California Corporation.

Affidavit of service by mail attached.

[Endorsed]: Filed February 23, 1956. [83]

In the United States District Court, Southern District of California, Central Division

No. 17354-TC Civil

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., dba Airest Mattress Co., Bankrupt,

Plaintiff,

vs.

AUTREY BROTHERS, INC., LEWIS AUTREY, STELLA AUTREY, and SLEEP E-Z MATTRESS CO., a California Corporation,

Defendants.

Honorable Thurmond Clarke, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Appearances:

For Plaintiff:
BUCHALTER, NEMER & FIELDS, By MURRAY M. FIELDS, ESQ.
CRAIG, WELLER & LAUGHARN, By THOMAS S. TOBIN, ESQ.

For Defendants:
BERTRAM H. ROSS, ESQ.

Wednesday, January 11, 1956—10 A.M.

The Clerk: Case No. 17354, Frank M. Chichester, Trustee in Bankruptcy for the estate of

Veraco, Inc., dba Airest Mattress Co., bankrupt, v. Autrey Brothers, Inc., et al., defendants.

The Court: Do you want to make a brief statement before you start in?

Mr. Ross: The first thing in order, your Honor, I think, is that we should waive a jury trial.

The Court: Yes, we do that formally.

Mr. Ross: Yes, your Honor; I wanted it on the record.

Mr. Tobin: We join in the waiver, your Honor.

The Court: Do you want to make a brief statement, Mr. Tobin?

Mr. Tobin: I think the Court will find this one of the most complicated messes the Court has ever encountered.

The Court: From whom do we inherit this one?

Mr. Tobin: Originally Judge Byrne, and then Judge Jertberg.

The Court: Well, we inherit all of Judge Jertberg's.

This was originally Judge Byrne's case?

Mr. Tobin: Originally Judge Byrne's case.

Well, in this case, the bankrupt is Veraco, Inc., a California corporation. It was owned and controlled by some [3*] brothers by name of Autrey. Two of the Autrey brothers are Vernon, who is, I notice, in the courtroom now, and Lewis Buster, one of the defendants, who is also present, of Autrey Brothers, Inc.

Autrey Brothers, Inc., was engaged in the manufacture of mattresses and bedding. Veraco, Inc.,

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

was supposed to be the retail outlet for Autrey Brothers, Inc., and conducted a series of retail stores. They wound up in bankruptcy, in Referee Head's Court, owing, I believe, around $170,000 total.

The examination of the brother Vernon in Referee Head's Court disclosed, according to Vernon Autrey, that by means of blackmail Buster Autrey had induced Vernon Autrey, who controlled Veraco, Inc., to transfer four outlets in California, without compliance with the bulk sales law of the State of California, to him, and, as I recall, it was around the 6th of November, 1953.

A few days later, on the 15th of November, 1953, using the same pressure and threatening criminal prosecution for embezzlement of funds belonging to the enterprise, four more stores were transferred. These other stores were outside the State; two of them were in Washington, one of them was in Oregon, and one of them was in Salt Lake City, Utah. No attempt was made to comply with the bulk sales laws of any of those states. They were retail outlets, and in no instance was there any attempt made to comply with the bulk sales law. [4]

We expect to show that after the suit was filed, based upon the transfer of these eight retail outlets to Autrey Brothers, Inc., this suit was started. After the issues were joined, a deposition was taken of the defendant Buster Autrey. It was taken at our office, and Buster Autrey was represented, and the defendant Autrey Brothers, Inc., was represented, by Buchalter, Nemer & Fields.

Mr. Ross: No, Mr. Tobin.

Mr. Tobin: I mean by Zeman, Hertzberg & Schekman.

The deposition started, I believe, about the 21st of December, 1954.

In the course of the deposition, Buster Autrey swore that, of the stores that were transferred, the retail stocks were all consigned merchandise and therefore there was no need to comply with the bulk sales law, and he could produce the consignment agreements.

The deposition was, accordingly, adjourned for two weeks to give him an opportunity to produce the consignment agreements he claimed he had.

In the meantime, during that two weeks adjournment of this deposition, we expect to show that Buster Autrey made another transfer of the stocks in trade from the defendant Autrey Brothers to another corporation he had organized in October, 1954, known as Sleep E-Z Mattress Company.

We then filed a motion before Judge Byrne to join the [5] Sleep E-Z Mattress Company as a party defendant, and set that up as an additional cause of action and sought to reach the merchandise.

We expect to prove that thereafter Buster Autrey disappeared and has been—he never signed the deposition that was taken before the notary public, whom we will have here, who took the deposition. We are going to endeavor to get that deposition in as admissions against interest on the part of the defendant Buster Autrey, notwithstanding

the fact that he defied the Court, defied the rules and everything else, and failed to sign it.

We have here the representative of the Times-Mirror Company and Vernon Autrey as our sole witnesses. We do not know where Buster Autrey is.

I am going to make my record by calling for him for cross-examination under the rule, Section 21(j) of the Bankruptcy Act, and we will go ahead and proceed as best we can.

The Court: All right.

Do you want to make a statement?

Mr. Ross: Yes.

May it please your Honor, Mr. Tobin, my brother across the way, is one man I know who calls a spade a dirty shovel in the easiest way possible, and I think he is stuck.

In this case we have a legalistic situation. We will admit, and offer to stipulate at this point, that the stores [6] that were transferred from Veraco Corporation to Buster Autrey in November, 1953, were transferred without compliance with the bulk sales laws of California, Washington, or Oregon. There is no question about that.

We raise this legal question: that if that be true, if that is the essence of the plaintiff's case, we are in a position to show that an existing creditor has not been produced and cannot be produced who is both a creditor at the time of the transfer and at the time of the bankruptcy of Veraco Company. In other words, the law is clear, and counsel and I, I think, can agree, that a violation of the bulk sales

law protects existing creditors but not subsequent creditors.

Now, if counsel can establish the question of actual fraud, as contrasted with a failure to comply with Section 3440 and other bulk sales laws, then subsequent creditors are protected, in which event the legal defense that I am stating is not applicable.

So far as the deposition is concerned, the evidence will indicate, and it can be produced, that until two months ago Mr. Buster Autrey, the defendant, was available to the process of this Court. It is not our fault that he didn't sign the deposition.

I did not become attorney of record in this case until long after the depositions were taken. I believe I became attorney of record in February or March of last year. If it [7] was the desire to have those depositions completed and filed, there is plenty of authority, under the rules, to have completed that.

I am going to object vehemently to the use of an incomplete deposition. Until yesterday afternoon, I was not asked to produce Mr. Autrey. Mr. Tobin wanted to know if he was available, and I said, "As far as I am concerned, I don't want him as a witness myself."

But our position is completely legalistic. Our position is definitely that, under the law, unless the Times-Mirror received no payment equivalent to the amount owed at the date of the transfers, we do not have an existing creditor within the meaning of Moore v. Bay, and I will quote other law later.

But that is our position. I wanted your Honor to understand our position.

The Court: All right.

Mr. Tobin.

Mr. Tobin: Is the representative of the Times-Mirror Company here?

A Voice: My name is Adams, and I was subpoenaed. I am secretary of the company. I am not entirely familiar with the handling of the details of billing and so forth.

The Court: Well have you brought someone?

Mr. Tobin: Have you brought someone here?

Mr. Adams: I have brought Mr. Bradshaw, who is the [8] assistant credit manager. He may be able to explain matters that I couldn't.

Mr. Tobin: I would like to call him then.

Thank you, Mr. Adams.

The Court: Call Mr. Bradshaw first.

Mr. Tobin: Yes, your Honor.

WILLIAM H. BRADSHAW

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: William H. Bradshaw.

Direct Examination

By Mr. Tobin:

Q. What is your occupation, Mr. Bradshaw?

A. Assistant credit manager, Times-Mirror Company.

(Testimony of William H. Bradshaw.)

Q. Were you employed by the Times-Mirror Company in that capacity on October 11, 1953?

A. Yes.

Q. And have you been continuously employed by the Times-Mirror Company in that capacity ever since? A. Yes.

Q. Are you familiar with the concern known as the Veraco Corporation, doing business as Sleep E-Z Mattress Company, with its place of business at 1490 Calzona, Los [9] Angeles? A. Yes.

Q. Did the Times-Mirror Company have an account with that corporation? A. Yes.

Q. Have you brought with you the ledger record of that account from October 11, 1953, to June 28, 1954? A. Yes.

Q. And you have it with you? A. Yes.

Q. Does that cover the Los Angeles Times alone?

A. No. It covers the——

Q. I mean that one statement.

A. The one statement does.

Q. Now, turning to the statement of the account between Veraco, Inc., and Los Angeles Mirror——

Do you have that with you? A. Yes.

Q. Between what dates does that account cover?

A. The statement I have here covers the period of November 5, 1953, through August 27, 1954.

Q. And the one covering the Mirror account, does that cover advertising that was done in the Los Angeles Mirror? A. Yes.

Q. And does the one that covers the Times account [10] represent advertising done in the Los

(Testimony of William H. Bradshaw.)

Angeles Times? A. Yes.

Q. The Times-Mirror Company is a corporation, of course? A. Yes.

Q. Organized under the laws of California?

A. Yes.

Q. Was this advertising contracted for on open account? A. Yes.

Q. And an open account carried?

A. Yes, an open account was carried.

Q. With the Times-Mirror Company?

I will ask you to state whether or not, at any time subsequent to October 11, 1953, the bankrupt, Veraco, Inc., was caught up and paid up entirely with the Times-Mirror Company on this open account?

Mr. Ross: To which we object on the grounds that it is incompetent, irrelevant and immaterial, your Honor.

The Court: I will overrule the objection.

You may answer.

The Witness: Prior to October 11, 1953?

Q. (By Mr. Tobin): No, any time after October 11, 1953, until the date of bankruptcy, which occurred on August 10, 1954, was that account ever balanced?

A. On the Los Angeles Times, the account was balanced January 18, 1954, and at the time of the expiration of the [11] account there remained, of course, an unpaid balance as of June 27, 1954.

Q. How much was that? A. $819.33.

(Testimony of William H. Bradshaw.)

Q. How about the Mirror account? What was its condition?

A. On November 5, 1953, the balance at that particular time—this will take a little figuring here.

The record indicates that on January 11, 1954, the November, 1953, balance was paid, brought to a balance.

Q. Was there any balance carried forward?

A. And then, from that time on, the continuous placements to the date of charging off to bad debt, August 27, 1954, leaving an unpaid balance of $1,646.54.

Q. I will ask you to state whether or not the bankrupt, Veraco, Inc., was continuously indebted to the Times-Mirror Company, either for advertising in the Times or the Mirror, or both, from and after November 9, 1953.

Mr. Ross: To which we object on the grounds that it is a conclusion and opinion of the witness, and not the best evidence. The records that have been produced are the best evidence.

The Court: I will overrule the objection and let him testify from the records here, to save time.

Do you want the question? [12]

The Witness: The record——

The Court: Can you answer it?

The Witness: The record at the Mirror, this particular ledger statement indicates that from this November 5, 1953, there was continuous placement, with the last advertisement being placed on June 25, 1954.

(Testimony of William H. Bradshaw.)

Q. (By Mr. Tobin): The question was, Was there ever a time from and after November 9, 1953, that this bankrupt was squared with the Times-Mirror Company?

Mr. Ross: That is objected to as incompetent, irrelevant, and immaterial under our legal theory, if the court please.

The Court: I will overrule the objection.

You may answer.

The Witness: Yes, I believe I previously mentioned, on Veraco, on the Times, the account was brought into balance on January 18, 1954, according to the records.

Q. (By Mr. Tobin): And how was it brought into balance?

A. By a payment made January 14 and January 18, 1954.

Mr. Tobin: Will you stipulate this is a photostatic copy of that account?

Mr. Ross: If I may see the original account. The witness has testified to entries that do not appear on my copy, so I would like to compare them, if I may, for just a moment, Mr. Tobin. [13]

The Court: Certainly.

(A pause while counsel compare documents.)

Mr. Ross: May I ask a question on voir dire?

The Court: Yes.

(Testimony of William H. Bradshaw.)

Voir Dire Examination

By Mr. Ross:

Q. The entry of August 20, 1954, is a charge-off entry? A. That is correct.

Q. Charging it off as a bad debt?

A. That is correct.

Mr. Ross: Under those circumstances, I will then stipulate that the documents counsel has handed me are photostats of the documents from which the witness has testified.

Mr. Tobin: I would like to offer this open account, if your Honor please, as Plaintiff's Exhibit 1.

The Clerk: Plaintiff's Exhibit 1.

(The document referred to, marked Plaintiff's Exhibit No. 1, was received in evidence.)

Direct Examination
(Continued)

By Mr. Tobin:

Q. Has the Times-Mirror Company filed a proof of debt in the bankruptcy matter of Veraco, Inc., to your knowledge?

Mr. Ross: We will stipulate that they did, Mr. Tobin. [14]

Mr. Tobin: We will accept the stipulation.

You may cross-examine.

Just one more question.

(Testimony of William H. Bradshaw.)

Q. Has the Times-Mirror Company ever been paid the balance that is owing it?

Mr. Ross: We will also stipulate to that.

Mr. Tobin: The stipulation is so accepted.

Cross-Examination

By Mr. Ross:

Q. Mr. Bradshaw, Exhibit 1, I believe, is the Times account; is that right, sir?

A. Beg your pardon, sir?

Q. Exhibit 1 is the transcript of the ledger of the Times account; is that right?

Mr. Tobin: It is really one exhibit, I believe.

The Witness: That I don't know.

Mr. Tobin: Why not make it 1-A and 1-B, for convenience of the record?

The Court: All right.

(The documents referred to were marked Plaintiff's Exhibits Nos. 1-A and 1-B, respectively, for identification.)

Q. (By Mr. Ross): In other words, the Times account consumes two pages, does it not, of ledger sheets?

A. It is one ledger sheet, completed merely on both [15] sides.

Q. Now, as of November, 1953, am I correct in stating that the highest amount of money that was due by Veraco to the Los Angeles Times was $262.50?

(Testimony of William H. Bradshaw.)

A. During the month of November, as I understand you——

Q. Yes, November, 1953.

A. ——the highest balance would be $268.80.

Q. $268.80 in November of 1953? A. Yes.

Q. Now, am I fair in stating that from November, 1953, until June, 1954, that Veraco had paid the Times more than the $282.28 figure you have just mentioned? A. I just——

Mr. Tobin: That is objected to as being immaterial, if the court please.

Mr. Ross: That is the whole theory of the defense, your Honor.

The Court: I will overrule the objection.

Mr. Ross: Thank you.

The Court: You may answer.

The Witness: You mentioned two hundred eighty-something dollars, sir. It is $268.80.

Q. (By Mr. Ross): Taking your figure of $268.80 and amending my question, it is true, is it not, sir, that between November, 1953, and June, 1954, that the Times-Mirror Company [16] received from Veraco more than that sum of money; isn't that correct? A. Yes.

Q. And isn't it a fact also that you testified that as of January 18, 1954, the account was in balance? A. Yes.

Q. And at that time Veraco owed nothing to the Los Angeles Times; is that correct, sir?

A. That is correct.

Q. Now, turning to the account of the Mirror,

(Testimony of William H. Bradshaw.)

which is Exhibit 1-B, would you say that it is correct that the highest sum that was due to the Mirror as of November, 1953, was $435.96?

A. According to this particular ledger sheet, that is true.

Q. Have you any other information, other than the ledger sheet?

A. I don't have the prior two ledger sheets for November.

Q. Is it also fair to state, Mr. Bradshaw, that after November, 1953, and down to June, 1954, the Mirror received in remittances from Veraco an amount in excess of $435.96?

Mr. Tobin: I make the same objection as I did to the last question, that it is immaterial, if the course please.

The Court: I will overrule the objection. [17]

You may answer.

The Witness: As I understand your question, that payments were received in excess of the amount owing at that particular time?

Q. (By Mr. Ross): Yes.

A. That is correct.

Q. It is also correct, is it not, that as of January 11, 1954, the account was in balance; isn't that correct?

A. That I would have to figure out with pencil and paper here to determine whether it was. From all indications, the payment of January 11, 1954, would bring it into balance as of December, 1953.

Q. Then, as of December, 1953, based upon the

(Testimony of William H. Bradshaw.)

payment made in January, 1954, there was a time when the account was paid and nothing was owing to the Mirror; is that right?

A. With the January 11th payment, plus credit, the account was paid. As I say, I would have to figure it out, but from all indications here, just looking at it, without putting it on pencil and paper, that particular payment, plus a previous payment of December 18, 1953, would have cleared up the balance as of December, 1953.

Mr. Ross: Thank you very much.

I have no further questions. [18]

Redirect Examination

By Mr. Tobin:

Q. Was there ever any time subsequent to November 9, 1953, that Veraco, Inc., didn't owe the Times-Mirror Company anything at all?

A. I can't answer that without having the complete records, sir, which I don't have with me.

Q. Well, does your record cover the period between November 9, 1953, and the date of bankruptcy, which occurred on August 10, 1954?

A. From November, 1953, to——

Q. Yes, November 9, 1953.

A. I thought you meant prior to that date.

Q. No.

A. I am sorry, sir. Would you reask the question, please?

Mr. Tobin: Would you read the question, please?

(Testimony of William H. Bradshaw.)

(The reporter read the questions as follows: "Q. Was there ever any time subsequent to November 9, 1953, that Veraco, Inc., didn't owe the Times-Mirror Company anything at all?")

The Witness: If I understand your question, if I may, in other words, prior to——

Q. (By Mr. Tobin): No, subsequent to November 9, 1953—after November 9, 1953, was there ever a time that Veraco, [19] Inc., didn't owe the Times-Mirror Company something?

A. On the Los Angeles Times, as of that January 18, 1954, date, there was nothing owing at that particular time.

Q. How about the Mirror?

The Court: Well, we will take a short recess, Mr. Tobin. You can check with him. He has his other man coming in at the rail now.

We will take a short recess of five or six minutes, and you can get these figures straightened out.

(A recess.)

The Court: You may take the stand again.

Did he get everything?

Mr. Fields: Not quite everything, but at least he has some explanation of the figures before him.

The Court: You may continue.

Q. (By Mr. Tobin): I believe the pending question was whether or not, on November 9, 1953, or at any time thereafter, the bankrupt, Veraco,

(Testimony of William H. Bradshaw.)

Inc., owed the Times-Mirror Company nothing on open account.

A. Do you want me to—just yes or no?

Q. Yes. A. At no time.

Q. I am thinking particularly about that January, 1954, entry that you testified to, that you said balanced it out as far as the Times was concerned. [20]

A. Well, in interpreting these ledger sheets here, on the Mirror, at no time was the account—there was always a balance due on the particular account of two——

Mr. Ross: I move that everything except the answer "No" go out as being nonresponsive, if the court please.

The Court: Yes, I will let the answer "No" remain, and the rest will go out.

Q. (By Mr. Tobin): In regard to the Times, I believe you testified on direct examination that there was one time, in January, I believe, of 1954, that the Times account had balanced out?

A. Yes.

Q. Can you tell us whether or not there had been a debit item against the bankrupt prior to January 18th which had not yet been posted?

Mr. Ross: Just a moment. I object to the question on the ground that the documents are in evidence and they speak for themselves.

Mr. Tobin: According to the records——

Mr. Ross: It is not the best evidence when the documents are before the court.

(Testimony of William H. Bradshaw.)

The Court: I will overrule the objection. I will let him answer.

The Witness: Answer the question?

The Court: Yes. [21]

The Witness: On January 18th, where the last payment previously mentioned brought it into balance, the next posting was an item of January 17, 1954, for an advertisement in the amount of $369.60.

Q. (By Mr. Tobin): That is $369.60?

A. $369.60. That particular January 17th posting, which, according to the books, should have been posted prior to the January 18th occasion, would have left that amount of balance owing at that particular time.

Q. And unpaid? A. As an unpaid item.

Mr. Tobin: That is all.

Recross-Examination

By Mr. Ross:

Q. Mr. Bradshaw, directing your attention to Plaintiff's Exhibits 1 and 1-A, which are photostats of your ledger sheets, were those records kept in the ordinary and due course of business of the Times-Mirror Company? A. Yes.

Q. And the postings of payments were made in the course of business, were they not?

A. Yes.

Q. Were these accounts kept under your direction and supervision? [22]

A. Yes, indirectly.

(Testimony of William H. Bradshaw.)

Q. What do you mean by that, sir?

A. As an assistant. The direct supervision would be, of course, my superior.

Q. And who is your superior?

A. Mr. Sikes.

Q. So far as you know, no special application was made, as to these payments, to any particular account; they were merely credited to the account, isn't that correct?

A. I don't believe I understand your question. "No special application" what?

Q. There was no special application made that any particular payment was in payment of a particular indebtedness; in other words, the payments were merely credited to the account as a running account, isn't that correct? A. Yes.

Q. And that was done in the ordinary and due course of business? A. Yes, that is correct.

Mr. Ross: I have no further questions of Mr. Bradshaw.

Mr. Tobin: That is all.

The Court: You may step down.

Mr. Tobin: I would like to call Vernon Autrey under Section 21(k) of the Bankruptcy Act.

The Court: Do you want the people to go [23] now?

Mr. Tobin: He may be excused as far as we are concerned, your Honor.

The Court: All right.

Mr. Autrey.

Mr. Ross: May it please the court, at this time,

before the witness is sworn, I object to this witness being called under Section 21(k) of the Bankruptcy Act. This is a plenary civil action, and the witness is either being called as a witness for the plaintiff under the general laws of the United States or he is not being called for that purpose.

The Court: I will let him be called. Really, it is a close technical point; it is something like Section 2055. It really doesn't make any difference. I will let him call him under that section.

VERNON W. AUTREY

called as a witness by the plaintiff under the provisions of Section 21(k) of the Bankruptcy Act, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Vernon W. Autrey.

Direct Examination

By Mr. Tobin:

Q Where do you live?

A. At 1025 South Orchard Drive, Inglewood, California. [24]

Q. Were you an officer of the bankrupt corporation, Veraco, Inc.?

The Witness: I would like to refuse to answer any questions today on the grounds that it might incriminate or degrade me in certain matters of different things, and until I have advice from my attorney and have him present.

(Testimony of Vernon W. Autrey.)

Mr. Tobin: And by whom——

The Court: I will overrule the objection. I think it is all right here. This is a civil action. It is not going to affect him in any way.

You can answer it.

The Witness: All right.

What was the question?

Mr. Tobin: Would you read the question, please?

(The reporter read the pending question as follows: "Q. Were you an officer of the bankrupt corporation, Veraco, Inc.?")

The Witness: Yes.

Q. (By Mr. Tobin): And what kind of business was Veraco, Inc., engaged in?

A. Retail bedding business.

Q. And was it a California corporation?

A. Yes.

Q. And what office did you hold in the bankrupt corporation? [25]

A. I was president.

Q. Over what period of time?

A. I believe it was from June, 1952, up until the bankruptcy, August 10, 1953.

Q. Are you acquainted with a man by name of Lewis Autrey? A. Yes.

Q. And is he any relative of yours?

A. Yes.

Q. Are you acquainted with Stella Autrey?

A. Yes.

Q. What relationship is she of yours?

(Testimony of Vernon W. Autrey.)

A. A sister-in-law.

Q. And Lewis Autrey is your brother?

A. My brother, yes.

Q. And was Autrey Brothers, Inc., a California corporation? A. As far as I knew, it was.

Q. Do you know who operated and controlled Autrey Brothers, Inc.? A. Yes.

Q. Who? A. Lewis B. Autrey.

Q. And who operated and controlled Veraco, Inc.? A. Myself. [26]

Q. And in which part of the business was Autrey Brothers, Inc., active?

A. Manufacture of the products.

Q. And in which part was Veraco, Inc., active?

A. Retailing the products.

Q. And whereabouts did Veraco, Inc., have its place or places of business?

A. In California, Oregon, and Washington and Utah and Arizona.

Q. Prior to November 9, 1953, did Veraco, Inc., have a retail place of business at No. 2039 West Pico Boulevard, Los Angeles? A. Yes.

Q. And did it have a retail place of business at No. 17113 Bellflower Boulevard, Bellflower, California?

A. It might have for a week; it was a short time.

Q. But it was prior to November 9, 1953?

A. Yes.

Q. And did it have another place of business at No. 11950 East Garvey Boulevard, El Monte?

(Testimony of Vernon W. Autrey.)

A. Yes, for a short period.

Q. Did it also have a place of business at Salt Lake City? A. Yes.

Q. Where was it located? [27]

A. At 450 South Main Street.

Q. And all four of those places of business were engaged in the retail sale of bedding?

A. Yes.

Q. And mattress equipment?

A. Yes—not equipment, just bedding; mattresses and box springs and accessories.

Q. That is what I mean, bedding equipment.

A. Yes, bedding accessories.

Q. Now, on November 3, 1953, were these places of business transferred to anyone?

Mr. Ross: Just a moment. I object on the ground that counsel is leading this witness, if the Court please.

The Court: Well, it will shorten it and save time. I will overrule the objection.

You may answer.

The Witness: Could I hear the question again?

Mr. Tobin: Yes.

Would you read it please.

> (The reporter read the pending question as follows: "Q. Now, on November 3rd"——)

Mr. Tobin: No, on November 9th.

The Reporter (Reading): "Q. Now, on November 9, 1953, were these places of business transferred to anyone?" [28]

(Testimony of Vernon W. Autrey.)

The Witness: Yes, on November 5th they were, some of them, transferred.

Q. (By Mr. Tobin): To whom?

A. To Autrey Brothers, Inc.

Q. Did that transfer take place in regular business hours? A. No.

Q. What time of day did the transfer occur?

A. Of an evening; around six or seven or eight o'clock of an evening.

Q. And what places of business were transferred on that occasion in the evening?

A. On November 5th, as well as I can remember, it was the Bellflower address and the El Monte address and, I believe, the Salt Lake City address and the Pico Street address—West Pico in Los Angeles.

Q. And whereabouts did that transfer take place?

A. At the Autrey Brothers factory in Santa Monica.

Q. And who was present at the time that the transfer occurred?

A. Veraco or Autrey Brothers.

Q. Who were the persons present?

A. I was president—Present?

Q. Yes, who were present at the time the transfer took place? [29]

A. Myself and attorney for myself, a Mr. Silver, and Mr. Schekman and Lewis B. Autrey and Harry Traub, and it seems like brother Floyd Autrey was there at the time.

(Testimony of Vernon W. Autrey.)

Q. Did any conversation take place at that time leading up to the transfer of these outlets that you have testified to?

A. There were several conversations.

Q. And who participated in them?

Mr. Ross: Do you mean at that meeting, Mr. Tobin?

Mr. Tobin: At that meeting.

The Witness: Myself and Lewis Autrey and Harry Traub.

Q. (By Mr. Tobin): What did those conversations pertain to?

Mr. Ross: That calls for a conclusion. You can ask him what the conversation was.

The Court: Yes. I will sustain the objection.

Q. (By Mr. Tobin): What, if anything, was said by you and by your brother Lewis Buster Autrey at that conversation?

A. There was so much said I can't remember a detailed outline of it.

Q. Well, give us the substance of it.

A. They were claiming that I owed so many thousands of dollars and they wanted full payment or some of the stores for it, and we had agreed on giving them four stores at that time and so much per week. [30]

Q. Was there any threat of criminal prosecution made to you unless you transferred those four stores to Autrey Brothers, Inc.?

A. Yes, there was.

Q. And by whom was that threat made?

(Testimony of Vernon W. Autrey.)

A. Lewis B. Autrey.

Q. And did Lewis B. Autrey tell you how much money you were supposed to have misappropriated that belonged to Autrey Brothers?

A. I have heard three or four times from $50,000 to $200,000.

Q. And were you frightened?

A. Certainly.

Q. And as a result of that conversation then, that you had with Lewis Autrey and his attorneys, did you make this transfer?

A. Yes, we did.

Q. Approximately what was the value of the merchandise that was transferred from Veraco, Inc., to Autrey Brothers in that transfer?

A. At that transfer, just a guess at it, was forty, forty-five thousand dollars.

Q. In stock?

A. Yes, and equipment of trucks and stock and locations and things of that nature. [31]

Q. And then was there another transfer that occurred later on?

A. Yes, about a week or two weeks later on, there was three more stores transferred.

Q. Where were they located?

A. Seattle, Tacoma, and Portland, Oregon.

Q. What were the circumstances under which those stores were transferred?

A. Well, this first agreement was to pay $7,000 a week, which I couldn't pay.

Q. To whom?

(Testimony of Vernon W. Autrey.)

A. To Lewis B. Autrey, Autrey Brothers; and we relinquished the other three stores to keep from having to meet the $7,000 payment each week.

Q. And did you at any time prior to the transfer of these stores give any notice to the creditors of Veraco, Inc., that you intended to transfer these stores in Oregon and Washington? A. No.

Q. By registered mail? A. No, I never.

Q. Did you give any notice of any kind or description to any of the creditors of Veraco, Inc., that it was your intention to transfer its retail outlets to Buster Autrey? A. No, I never. [32]

Q. Do you know whether or not Buster Autrey gave any such notice to any of the creditors?

A. Not that——

Mr. Ross: May I be heard a moment? I offered a stipulation that I thought was accepted.

Mr. Tobin: I believe it was, but——

Mr. Ross: Then I would like to be relieved from that stipulation.

Mr. Tobin: We have also a part of this complaint, your Honor please, that this transfer was made——

The Court: I think the stipulation takes care of all that.

Mr. Tobin: It is a matter of atmosphere, on the question of intent.

The Court: Well, I will sustain the objection. The stipulation takes care of that, I think.

Q. (By Mr. Tobin): I believe you testified that

(Testimony of Vernon W. Autrey.)

two of these stores were in the State of Washington? A. Yes.

Q. Whereabouts were they located?

A. One in Seattle, Washington, and one in Tacoma, Washington.

Q. And whereabouts was the store in Seattle located? A. 7808 Arroyo Boulevard.

Q. What was the value of its stock and equipment? [33]

A. Approximately about fifteen to eighteen thousand dollars.

Q. With regard to the store at Tacoma, Washington, where was it located?

A. I don't remember the correct address. It was on Tacoma Way, but I don't remember the correct address. Might be 5211.

Q. 5311 South Tacoma Way?

A. It might have been that.

Q. In Tacoma? A. Yes.

Q. What was the value of the stock and fixtures in that store?

A. From four to six thousand dollars. That was a small store.

Q. Then the store at Portland, Oregon, where was it located?

A. At 2800 Northeast Sandy Boulevard.

Q. And what was the value of the stock and fixtures in that store?

A. Approximately ten to twelve thousand dollars, as well as I recall.

Q. Now, after you got through with these two

(Testimony of Vernon W. Autrey.)

transfers which took place on November 5th and November 16th, 1953, what other assets did Veraco, Inc. have left to pay its [34] creditors?

A. It had four or five small outlets in the Bay area in California.

Q. You mean in the San Francisco Bay area?

A. Yes. And I believe we established a place here on Calzona Street. I think there were one in Sacramento, California. There was, I think, five small outlets left.

Q. Well, on November 16, 1953, these transfers had been completed, had they? A. Yes.

Q. When did you open the outlets in the Bay area around San Francisco?

A. That was opened—some of them was already opened before any transfers, and some of them was opened later. I don't recall just which ones they were. And they were moved from one location to the other.

Q. Well, do you have any personal knowledge of any subsequent transfers of these retail outlets made by your brother Buster Autrey or Autrey Brothers, Inc.? A. Since——

Q. Since this lawsuit was started?

A. Yes, I have a few knowledges of them.

Q. Will you please tell the court about those subsequent transfers?

A. Most of mine is hearsay. Transferred some Kansas [35] City stores to another operation.

Q. Known as what?

(Testimony of Vernon W. Autrey.)

A. As—well, that was known as Autrey Brothers, and he had transferred part of the operation in the Western States here to himself and to Sleep E-Z Mattress, Inc.

Q. Now, when was this Sleep E-Z Mattress, Inc. organized?

A. I understand sometime in 1954. I don't really know.

Q. October, 1954? A. I understand it was.

Q. And you were examined in the Bankruptcy Court before Referee David Head on August 30, 1954, and again on September 2, 1954, regarding these transactions? A. Yes.

Q. And you disclosed to the trustee, Mr. Chichester, the transfer of these stocks in these various retail outlets to Buster Autrey?

Mr. Ross: Just a moment. I object to counsel testifying, your Honor, and further object——

The Court: Yes, I will sustain the objection to the question.

You have made it too lengthy, Mr. Tobin.

Q. (By Mr. Tobin): Did you, at the examination of the first meeting of creditors, held on August 30, 1954, and September 2, 1954, disclose to the plaintiff, Frank [36] Chichester, the circumstances under which these transfers had been made?

Mr. Ross: I object to that on the grounds that it is incompetent, irrelevant, and immaterial, your Honor. He can't impeach his own witness.

The Court: I will overrule the objection.

You may answer.

(Testimony of Vernon W. Autrey.)

The Witness: I tried to notify Mr. Chichester of any changes that I had seen, at each time.

Q. (By Mr. Tobin): Now, subsequent to the first meeting of creditors held in Referee Head's court on August 30, 1954, did your brother Buster Autrey tell you that he had been sued by the trustee in bankruptcy for the estate of Veraco, Inc.?

A. He never told me. I had heard it from other sources.

Mr. Ross: I move the answer be stricken as being nonresponsive, your Honor.

The Court: It may go out.

Q. (By Mr. Tobin): Did you ever discuss with him the fact that he had been sued? A. No.

Q. Did he ever discuss with you the fact that he had been sued? A. No. [37]

Q. Have you had any conversations with Buster Autrey since this suit was filed in this court on——

Mr. Ross: October 19, 1954.

Q. (By Mr. Tobin): ——October 19, 1954?

A. Yes, I have.

Q. Did he discuss the fact that this suit was pending, with you?

A. He might have mentioned it, but he didn't discuss any of it with me.

Q. Did he tell you anything about a subsequent transfer of the place of business situated at No. 2800 Northeast Sandy Boulevard, Portland, Oregon?

A. The transfer of it?

Q. Yes, after this suit was filed.

A. Not that I know of.

(Testimony of Vernon W. Autrey.)

Q. Do you know anything about a store situated at 850 South Main Street, Salt Lake City, Utah?

A. Yes.

Q. And was that owned by Veraco, Inc.?

A. It was once.

Q. Was that the store that was transferred at Utah? A That is right.

Q. To Autrey Brothers, Inc.? A. Yes.

Q. Do you know what ultimately became of that stock? [38] A. Yes.

Q. What was done with it?

A. As it is now, the store is closed, and the stock was sold through a liquidator in Salt Lake City by the name of Jack Bowman, and a company that I am associated with at present, another company, has bought most of the stock from them.

Q. What is the name of that company?

A. Mattress City at Salt Lake City.

Q. Mattress City? A. Yes.

Q. And is that organized under the laws of the State of Utah?

A. No; under the State of Texas.

Q. Under the State of Texas?

A. It is a Texas corporation.

Q. Who owns that corporation?

A. Dunbar and myself.

Q. And was Dunbar connected with Veraco, Inc.? A. No, never was.

Q. Was he connected with Autrey Brothers?

A. He was a salesman at one time.

Q. When was this store at 850 South Main

(Testimony of Vernon W. Autrey.)

Street put out of the name of Autrey Brothers, Inc.?

A. As well as I can remember, around the first of the [39] year it was transferred to Buster Autrey.

Mr. Ross: First of what year?

The Witness: This year—'55, rather.

Q. (By Mr. Tobin): Since this case has been set for trial?

A. Well, I don't know when.

Q. What were the circumstances under which this store got out of the name? It was in the name of Autrey Brothers. It was transferred——

A. Well——

Q. Let's follow this through. That store was transferred from Veraco, Inc. to Autrey Brothers, Inc., a California corporation?

A. That is right, yes.

Q. And then, subsequent to that, it was transferred from Autrey Brothers to——

A. Lewis B. Autrey.

Q. ——Lewis B. Autrey? A. Yes.

Q. Individually?

A. Yes, around January 1, 1955.

Q. The defendant here? A. Yes.

Q. And then what transfer occurred after that?

A. Well, he had become insolvent and had made some [40] arrangements with the creditors, his creditors, to liquidate it and sell them out, and made some kind of arrangements for payment. I don't actually know all the details of it, but I do

(Testimony of Vernon W. Autrey.)

know that all of the stores are closed and sold out now.

Q. Well, this Salt Lake City business was transferred then from him to whom?

A. Nobody. It was just closed at that time.

Q. And a liquidator sold it out?

A. The trustee in bankruptcy. It was transferred to a CAC Corporation, I believe.

Q. And that CAC Corporation is in bankruptcy in Referee Brink's court at the present time, is it not?

A. I think it is in Bergener's court.

Q. Referee Bergener's court?

A. Yes; and the receiver has sold inventory out of the Salt Lake City store.

Q. Who purchased the inventory from the receiver of CAC Corporation?

Mr. Ross: That is objected to on the grounds that it is incompetent, irrelevant, and immaterial, and it is far afield of any of the issues in this case, your Honor.

Mr. Tobin: On this question of intent, too.

The Court: I will overrule the objection.

You may answer.

The Witness: There is a Premier Sales—the president [41] of it is Jack Bowman of Salt Lake City—had purchased this inventory and a truck from the trustee in bankruptcy.

Q. (By Mr. Tobin): What I am getting at, Mr. Autrey: Has that stock gotten back into the hands of one of the brothers, regardless of how circuitous the route was?

(Testimony of Vernon W. Autrey.)

A. Well, I suppose that you would say that half of it got back in my hands.

Q. How many brothers are there of you?

A. Four.

Q. And what are their names?

A. That is, in this business, is Floyd Autrey, Lewis B. Autrey, myself, and E. T. Autrey.

Q. And you are all four in the bedding business?

A. Yes, that is right.

Q. And throughout what states do your various bedding business ramifications extend?

Mr. Ross: Just a moment. I object to the form of the question, your Honor.

Mr. Tobin: It is on the question of intent, too.

The Court: I will overrule the objection.

You may answer.

The Witness: I was only connected in the four states, but some of the other brothers have operated it as far as Kansas City.

Q. (By Mr. Tobin): Where is Lewis Buster Autrey right [42] now?

A. I understand he is in Los Angeles here.

Q. When did he come back to Los Angeles?

A. I heard about two months ago. I haven't talked to him.

Q. Was he the person who suggested to you when you were called as a witness here to refuse to answer on the ground that your answer would tend to incriminate you?

A. No, he was not.

(Testimony of Vernon W. Autrey.)

Q. You haven't talked to him about being called here as a witness? A. No, I haven't.

Q. Getting to the second store, the store at 2800 East Sandy Boulevard, Portland, Oregon, what has become of that store?

A. That was moved to Seattle. That was closed and moved to Seattle.

Q. And the stock moved out of Oregon?

A. Yes.

Q. Into Seattle, Washington? A. Yes.

Q. And when was that done?

A. Four or five months ago or longer. I don't know the exact date it was. And that also was controlled and owned by CAC Corporation, and it was also sold. [43]

Q. Who are the stockholders of this CAC Corporation?

A. Mr. Harry Traub was 50 per cent of the stockholders, and I was 50 per cent.

Q. Did Harry Traub have any relationship at all with Veraco, Inc.? A. Yes.

Q. In what capacity?

A. He was accountant for the firm.

Q. And was he also the accountant for Autrey Brothers, Inc.? A. Yes.

Q. And was he the personal accountant for Lewis B. Autrey?

A. As far as I know, yes.

Q. And he handled your accounting, too?

A. Yes, he did.

(Testimony of Vernon W. Autrey.)

Q. When was this CAC Corporation, that you refer to, organized?

A. I believe it was in about April, 1955.

Q. In Texas?

A. No; California corporation?

Q. It is a California corporation? A. Yes.

Q. And how much money did you put in this CAC Corporation? [44]

Mr. Ross: Just a moment. I object to that as being incompetent, irrelevant, and immaterial, not binding on the defendants in this action, and completely remote to the problem at hand, your Honor.

The Court: I will overrule the objection.

You may answer.

The Witness: I put in inventory and equipment that I had in a small company in San Diego and Compton, in the CAC Corporation.

Q. (By Mr. Tobin): You had an inventory in San Diego and Compton? A. Yes.

Q. Standing in your individual name?

A. No, it was in—it was sort of a partnerships with a Mr. and Mrs. Hardebeck. We had a store there and a small factory in Compton.

Q. Will you please tell us under how many different trade names you and your brothers conducted your bedding business?

A. I think there was four, all together, with the exception of the corporation.

Q. Veraco, Inc., was one, wasn't it?

A. Yes, doing business as Sleep E-Z Mattress and Airest Mattress Company.

(Testimony of Vernon W. Autrey.)

Q. And Sleeprest? [45] A. No.

Q. Didn't you have a number of Sleep E-Z or Sleep—— A. No.

Q. ——concern trade names that you were doing business under in various parts of the country?

A. One brother was operating under "Sleepopedic Mattress Company."

Q. What's that?

A. Sleepopedic Mattress Company.

Q. Where was that?

A. That is in Texas.

Q. How many operations did you have in the State of Washington? We will go at it geographically. How many operations did you have in the State of Washington?

Mr. Ross: Referring to this witness or——

Q. (By Mr. Tobin): You or your brothers?

Mr. Ross: Thank you.

Q. (By Mr. Tobin): The four of you?

A. As far as I know, the only ones I know was Sleep E-Z Mattress Company, and then——

Q. Where? A. In Washington.

Q. Whereabouts in Washington?

A. At these same locations: 7800-7808 Arroyo Avenue and 4501 South Rainier in Seattle, Washington, and Portland, [46] Oregon; and the only two names that we operated was Sleep E-Z Mattress Company and Airest Mattress Company.

Q. And they were actually owned originally by Veraco?

A. The Sleep E-Z was owned by Veraco until

(Testimony of Vernon W. Autrey.)

we had made our transfer, and I omitted using Sleep E-Z and I had to use Airest Mattress Company.

Q. And Autrey Brothers was the actual owner?

A. Yes.

Q. And then where did the Seattle and Tacoma outlets ultimately wind up?

A. In bankruptcy—of CAC.

Q. Well, trace it right on through, please.

A. Well, they had closed up the Tacoma store and moved it into the 7808 Arroyo store.

Q. That is, at Seattle?

A. Yes, Seattle. They had operated and opened up a store at 4501 South Rainier in Seattle, and they had operated those three stores until they transferred them to CAC Corporation, and CAC Corporation has filed a petition in bankruptcy and they have liquidated them.

Q. And who ultimately got those stocks in trade?

A. I don't know——

Mr. Ross: You mean from the trustee in bankruptcy?

Mr. Tobin: Yes.

The Witness: I don't know. [47]

Q. (By Mr. Tobin): Did you?

A. No, I never got them.

Q. Or any corporation owned and controlled by you? A. No.

Q. Or any of the Autrey brothers?

A. No.

Q. That you know of?

(Testimony of Vernon W. Autrey.)

A. No, none of the Autrey brothers.

Q. Going one state farther south—Oregon, what operations did the Autrey brothers have in Oregon? And by "Autrey brothers" I refer to you four brothers under your various corporate enterprises.

A. Yes, the same as the Seattle store, and it was transferred to CAC Corporation and eventually was liquidated by the Bankruptcy Court.

Q. And who ultimately bought the Oregon store?

A. It was just closed and moved into Seattle, and from there is was liquidated through the Bankruptcy Court.

Q. Now, getting down to the State of California, how many operations did you four Autrey brothers have in the State of California?

A. Well, Lewis Autrey had Sleep E-Z Mattress Company.

Q. That was the corporation he organized in October, 1954—or '53, rather?

A. No. At first he was doing business as an individual [48], fictitious firm name of Sleep E-Z Mattress Company.

Q. Well, wasn't that a corporation?

A. Not at first. The second——

Q. Was it ever a corporation?

A. It was. We formed Sleep E-Z Mattress, Inc., I think, the last of 1954.

Q. That was after this suit was started: is that right?

(Testimony of Vernon W. Autrey.)

A. I don't know what time this suit was started, today.

Mr. Ross: We will stipulate it was after this suit was filed.

Q. (By Mr. Tobin): And then, after suit was started, he transferred what stores to Sleep E-Z Mattress Company, Inc.?

Mr. Ross: If any, Mr. Tobin.

Mr. Tobin: Yes.

The Witness: I think he transferred the Seattle store, Salt Lake——

Q. (By Mr. Tobin): We will get to the Salt Lake later. A. I don't actually know.

Q. How about these California stores that wound up in the——

A. At that point I don't know whether he transferred them into the Sleep E-Z Mattress, Inc., or—I know he had a creditors' meeting, and his creditors wanted him to do business as an individual instead of a corporation, and at [49] that time he was wanting to transfer them into this corporation, Sleep E-Z Mattress, Inc., that he had formed. I don't know whether he ever did or not. The creditors requested him to operate as an individual.

Q. Well, now, getting back to the California operations, what operations were carried on in the State of California by you four Autrey brothers?

A. Well——

Q. If you will outline them to the court.

Mr. Ross: As to what period of time, Mr. Tobin?

(Testimony of Vernon W. Autrey.)

Q. (By Mr. Tobin): During the period between November 5, 1953—November 4, 1953, and the date of the bankruptcy of Veraco, Inc.?

A. Well, Lewis B. Autrey and E. T. Autrey and Floyd Autrey, the three brothers, operated as Sleep E-Z Mattress Company, and they were stockholders, or supposed to have been, in Autrey Brothers, Inc., and doing business as Sleep E-Z Mattress Company, and I was doing business as Veraco, as the owner and doing business as Airest Mattress Company, and I think that is all that I know that they operated under.

Q. And was Lewis B. Autrey a director of Veraco—an officer? A. No.

Q. Wasn't he vice-president of Veraco, Inc.?

A. He might have been vice-president. I know he never [50] went to a meeting of the corporation at all.

Q. Well, he had a great deal to say about the operation of Veraco, Inc., did he not?

A. Yes.

Q. And didn't he have a right to sign checks on its bank account? A. That is right.

Q. And didn't Harry Traub have a right to sign checks on the bank account?

A. Yes, he did, a short period.

Q. And did you? A. Yes, I did.

Q. Now, was there any partnership arrangement between Autrey Brothers and Veraco, Inc.?

A. Yes, a verbal agreement between us.

(Testimony of Vernon W. Autrey.)

Q. What is that?

A. It was a verbal agreement; not a written one.

Q. And when was this partnership arrangement entered into between the two corporations?

A. When we first started; I would say around the middle of the year of '52.

Q. And what was the verbal arrangement?

A. The arrangement was——

Mr. Ross: I object to that as calling for a conclusion of the witness, your Honor. There was some conversation in [51] which——

Q. (By Mr. Tobin): State the conversation, then.

The Court: All right, give us the conversation, if any.

Mr. Ross: Let's have the foundation, too.

The Witness: The conversation was——

Mr. Ross: Just a moment.

The Court: He wants the foundation.

Mr. Tobin: Just a moment.

Q. Who participated in this conversation, on behalf of Veraco, Inc.? A. I did.

Q. And who participated in this conversation on behalf of Autrey Brothers, Inc.?

A. Lewis B. Autrey.

Q. And where did the conversation take place?

A. There was several conversations. Sometimes at Veraco's office.

Q. Between what periods of time?

(Testimony of Vernon W. Autrey.)

A. Oh, between March of 1952 and throughout the year of '52.

Q. And who was present at these various conversations?

A. Most of the time, Lewis B. Autrey and myself.

Q. Taking up the preliminary conversations at which this arrangement was arrived at, what was said by you and what was said by Lewis [52] Autrey? A. About what, for instance?

Q. About what arrangements you were going to have between the two corporations for your operation and participation in profits?

A. Well, we had agreed on Veraco would sell the item and give production to the factory at an even quote—no profit, you know—and the factory was to make the profit, and we were to divide the profit of the factory.

Q. In other words, Autrey Brothers was to manufacture, and Veraco was to sell?

A. Yes.

Q. And how long did this partnership arrangement between these two corporations——

Mr. Tobin: I withdraw that.

Q. You owned and controlled Veraco, Inc.?

A. That is right.

Q. And your brother Lewis owned and controlled Autrey Brothers, Inc.?

A. That is right.

Q. Was there any attempt made to inject any

(Testimony of Vernon W. Autrey.)

other of your brothers in the arrangement between Autrey Brothers, Inc., and Veraco, Inc.?

A. Not until 1953, November.

Q. And in 1953 when was there an effort made, if any, to inject some more of your brothers [53] into it?

A. Yes, around the first of November of '53.

Q. Was that what caused the rift between yourself and Buster? A. I believe it was.

Q. And who proposed to inject some of your other brothers?

Mr. Ross: I don't quite understand counsel's question—"inject." It is rather uncertain to me.

Mr. Tobin: I withdraw it.

Q. Who was it proposed to connect some of your other brothers with the operations of these two corporations?

A. It was Lewis B. Autrey and the other two brothers was proposing to have them to take over half of it—Veraco.

Q. And what were they to pay you?

A. Nothing.

Q. In other words, they wanted what proportion of Veraco, Inc., the bankrupt, to be turned over to three of your brothers?

Mr. Ross: Just a moment. I object to the form of the question as calling for a conclusion of the witness and a hearsay answer, your Honor.

Mr. Tobin: It is preliminary, your Honor.

The Court: I will overrule the objection.

(Testimony of Vernon W. Autrey.)

You may answer.

The Witness: It was one-half of it. [54]

Q. (By Mr. Tobin): And what arrangements were to be made then to pay the creditors of Veraco, Inc., after the one-half of the business was turned over to your other brothers?

A. At that point, the only creditors of Veraco was mostly newspapers.

Q. Well, what newspapers were they?

A. They were the Seattle Times and Salt Lake Tribune and the Los Angeles Examiner and various newspapers throughout the operation, and television, and our supplies was owed to Autrey Brothers, Inc.

Q. And what arrangements were contemplated to take care of these various newspapers throughout the West Coast?

A. They were being paid each month as a monthly bill. We didn't owe any great sums to them, only a regular course of business at that time.

Q. Can you give us an approximation of what the indebtedness of Veraco, Inc., is at the present time?

A. I think it is around one hundred twenty to one hundred thirty thousand.

Q. One hundred twenty to one hundred and thirty thousand dollars? A. Yes.

Q. And what assets did Veraco, Inc., have to meet those debts when you got through with this arrangement with [55] your brother Buster?

(Testimony of Vernon W. Autrey.)

Mr. Ross: Just a moment. That assumes a fact not in evidence, your Honor. There is no testimony——

The Court: I will sustain the objection.

Q. (By Mr. Tobin): As against the one hundred and twenty to a hundred and thirty thousand dollars in liabilities owed by the bankrupt, Veraco, Inc., what assets did it have?

Mr. Ross: Just a moment, Mr. Tobin. I want to find out, did it owe the hundred and twenty thousand in November, 1953, or was this at the time it filed its petition in July or August, 1954? I think that makes a difference.

Mr. Tobin: At the date of bankruptcy.

The Court: I will overrule the objection.

Q. (By Mr. Tobin): At the date of bankruptcy, how much did Veraco, Inc., owe?

A. Approximately one hundred and twenty to one hundred and thirty thousand dollars at the date of bankruptcy.

Q. And what assets did it have to meet those liabilities?

Mr. Ross: Just a moment. I object on the grounds that it is incompetent, irrelevant, and immaterial, your Honor. What its liabilities were at the time of its adjudication in bankruptcy in August, 1954, is too remote in time from these transfers. I think the essential element of the plaintiff's theory of the case is correct as to what

(Testimony of Vernon W. Autrey.)

the assets and [56] liabilities were at the time of transfer.

Mr. Tobin: Section 67——

The Court: I will overrule the objection.

You may answer.

The Witness: It was around a thousand dollars.

Mr. Tobin: About a thousand dollars to pay one hundred and twenty thousand dollars in liabilities.

If your Honor please, we have here the reporter from Referee Rifkind's court.

The Court: Do you want to put him on out of order?

Mr. Tobin: Yes, if your Honor please.

The Court: Step down, please.

We will put him on out of order. Do you want him to read his notes?

Mr. Tobin: I don't believe it will be necessary, your Honor.

The Court: All right. Put the reporter on.

LOUIS SOMMERS

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows.

The Clerk: State your full name, please.

The Witness: Louis Sommers. [57]

Direct Examination

By Mr. Tobin:

Q. Mr. Sommers, you are the official reporter for Referee Joseph Rifkind? A. I am.

(Testimony of Louis Sommers.)

Q. And you are also a certified court reporter?

A. I am.

Q. I will ask you to state whether or not you attended on the taking of the deposition of one Lewis Buster Autrey, commencing December 22, 1954, and adjourned to January 6, 1955, and resumed on January 6, 1955, in this case, which is No. 17354-TC, entitled Frank Chichester as Trustee in Bankruptcy for the estate of Veraco, Inc., doing business as Airest Mattress Co., bankrupt, against Autrey Brothers, Inc.; Lewis Autrey, and Stella Autrey, defendants.

A. I was the reporter at those depositions.

Q. And as such reporter did you swear the defendant Lewis Buster Autrey?

A. I did, as notary public.

Q. And did you take down his testimony in shorthand? A. I did.

Q. In question and answer form?

A. Yes, sir.

Q. Did you thereafter transcribe this deposition into longhand? [58]

A. It was transcribed under my direction.

Q. That is what I mean. And thereafter did Mr. Autrey at any time appear, pursuant to the stipulation contained in that deposition——

Mr. Ross: Just a moment. To which we object on the ground that it calls for a conclusion——

Mr. Tobin: I am not through yet.

Mr. Ross: I'm sorry.

(Testimony of Louis Sommers.)

Q. (By Mr. Tobin): Thereafter, did Mr. Autrey at any time, pursuant to the stipulation contained in that deposition, appear to sign the deposition?

Mr. Ross: To which we object on the ground that the question calls for a conclusion of the witness, to appear pursuant to the stipulation contained in the deposition.

Mr. Tobin: I will withdraw the question and reframe it, your Honor.

The Court: All right.

Q. (By Mr. Tobin): Subsequent to the taking of this deposition on December 22, 1954, and on January 6, 1955, did the defendant Lewis Buster Autrey ever appear before you to examine this deposition and swear to its correctness?

Mr. Ross: To which we object on the grounds that it is incompetent, irrelevant, and immaterial.

May it please the Court, it is obvious, and I think counsel will agree, that this deposition has never been [59] signed. The law requires that before a deposition can be used in this court it has to be signed and sworn to by the witness. There is a statutory method requiring the compliance to use the deposition as evidence. Under Rule 32(d) of the rules for the government of the business of these courts, I move to suppress that deposition upon the grounds that it has never been signed or filed, and I have never had any opportunity to know if there was any desire to use the deposition.

The ordinary and usual method is that if a dep-

(Testimony of Louis Sommers.)

osition is not signed at some time prior to the trial, or a request is made upon counsel or somebody to have it signed, if it is not, a citation for contempt issues, and the matter is ordered by the court to be signed and the witness has an opportunity.

Just because counsel has either been lazy or negligent is no reason to attempt to get a deposition in by a back-door method where the law permits it to come in properly.

Mr. Tobin: If your Honor please, in the case of Sampsell v. Anches that very question arose in the Ninth Circuit in connection with the use of a Section 21(a) transcript of a witness who was later a defendant in an action in Seattle brought by the trustee in bankruptcy against a person who had been examined in the Bankruptcy Court under Section 21(a) regarding transfers of property made by a dishonest bankrupt to him. [60]

At the time of trial in Seattle, an objection was made to the introduction of this Section 21(a) transcript on the ground that it was in the nature of a deposition and was inadmissible because of the fact that it had not been taken in accordance with the regular deposition practice. An objection was sustained to the introduction of this, and a verdict ultimately was directed in favor of the defendants.

The case went up to the Ninth Circuit, and the Ninth Circuit reversed the district judge in Seattle and held that that deposition was admissible both as substantive proof—I mean that that Section

(Testimony of Louis Sommers.)

21(a) transcript was admissible both as substantive proof of the facts and for the purpose of impeachment against the person from whom the testimony was elicited.

The result was, the District Court was reversed and the Ninth Circuit definitely laid down the rule, following a former case of Slattery v. Dillon, that as an admission against interest it was admissible.

Here we have a situation, if your Honor please, where in good faith, represented by other attorneys, prior to the trial of this case and in this proceeding, one of the defendants, Buster Autrey, who admittedly owns and controls Autrey Brothers, was brought in and his deposition was taken on two different occasions. He walked out of the deposition room, and we haven't seen him since. [61]

Certainly a deposition ought not to be suppressed by reason of the misconduct on the part of this defendant who has not even appeared here at the trial of this case.

The Court: Mr. Ross.

Mr. Ross: May it please the Court, in the first place, the Anches case dealt with a Section 21(a) examination in bankruptcy. There is no question in my mind that if a witness takes the stand, his testimony on any prior occasion, whether it is under Section 21(a) or any other form, can be used for the purpose of impeaching him as contradictory statements having been made.

(Testimony of Louis Sommers.)

But here in this case, this is a deposition taken under Rules 26, 27, 28, 29, 30, 31, 32 and 33 of the Rules of Federal Procedure. Now, counsel can't yell "Bad faith" if he just didn't follow the rules and get his testimony and his discovery completed.

I submit that if Mr. Autrey were to take the witness stand in this case and testify, that the deposition could be used for the purpose of impeaching him. But the deposition cannot be used as a part of his case in chief.

Now, obviously, counsel says Mr. Autrey isn't here. As the attorney for the defense, it is my prerogative to produce such witnesses as I feel may be necessary. And there is no showing that there has ever been any attempt by the plaintiff to have Mr. Autrey produced at this time. There is [62] no showing that any subpoena was in the hands of the Marshal. Nor is there any showing that any request has been made upon me since February of 1955 to have this deposition signed. Neither has there been any request made of Judge Byrne or Judge Jertberg or of yourself, your Honor, to request this man to read and correct this deposition.

I don't think counsel, by his own lack of diligence, can start calling names at other people.

I submit the deposition isn't admissible.

The Court: I will overrule the objection.

The witness may answer the question.

Mr. Ross: An exception may be noted?

The Court: Yes.

(Testimony of Louis Sommers.)

The Witness: I have forgotten the question.

Mr. Tobin: Would you read the question, please?

(The reporter read the pending question as follows: "Q. Subsequent to the taking of this deposition on December 22, 1954, and on January 6, 1955, did the defendant Lewis Buster Autrey ever appear before you to examine this deposition and swear to its correctness?")

The Witness: No, he did not.

Q. (By Mr. Tobin): Has that deposition ever been signed by Buster Autrey, to your knowledge?

A. Not to my knowledge. I just don't [63] know.

The Court: We can stipulate that it is not signed?

Mr. Ross: So stipulated, your Honor.

The Court: It is stipulated that it is not signed. The witness wouldn't know.

Mr. Tobin: I would like to have this marked as plaintiff's exhibit next in order for identification.

The Clerk: Plaintiff's Exhibit 2.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

The Court: Is that all for the witness?

Mr. Tobin: I believe I will ask just one more question, your Honor.

Q. Showing you Plaintiff's Exhibit 2 for identification, I will ask you to examine that and tell us if that is a true and correct transcription in

(Testimony of Louis Sommers.)

longhand of the testimony given by the defendant Lewis Buster Autrey on January 6, 1955, and December 22, 1954?

Mr. Ross: May it be stipulated that, without repeating the objection and the exception, it may continue?

The Court: All right.

Mr. Ross: Thank you.

The Witness: To the best of my knowledge, this is a true and correct transcript of the testimony of Buster Autrey on those two dates.

The Court: All right. [64]

Mr. Tobin: We would like to offer that in evidence, if your Honor please.

Mr. Ross: To which we object upon the grounds that no proper foundation has been laid; no compliance has been had with Rules 26, 27, 28, 29, 30, 31, and 32 of the Rules of Federal Procedure.

The Court: In view of the court's previous ruling, I will overrule the objection and allow it to be received.

Mr. Ross: Exception, your Honor.

The Court: Yes.

Mr. Ross: Thank you, your Honor.

(The document referred to, marked Plaintiff's Exhibit No. 2, was received in evidence.)

Mr. Tobin: That is all as far as this witness is concerned, your Honor.

(Testimony of Louis Sommers.)

Cross-Examination

By Mr. Ross:

Q. How long have you known that I have been attorney of record for the defendants in this action?

A. I didn't know it up until this moment, and I still don't know your name.

The Court: You will stipulate that he came in after this? Isn't that correct?

Mr. Tobin: That's right. [65]

Q. (By Mr. Ross): No request was ever made of me to have Mr. Autrey sign this deposition?

A. Not by my office.

Q. And as far as you know, as notary public, you have taken no proceedings to have the deposition signed? A. That is correct.

Mr. Ross: No further questions, your Honor.

The Court: That is all. The witness may be excused. We will take a recess until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 p.m. of the same day.)

The Court: Do you want to put the witness back on the stand?

Mr. Tobin: Yes, your Honor.

VERNON W. AUTREY

resumed the stand as a witness called by the plaintiff under the provisions of Section 21(k) of the Bankruptcy Act and, having been previously duly sworn, testified further as follows:

Direct Examination
(Resumed)

By Mr. Tobin:

Q. Now, this morning, when I questioned you regarding a threat of criminal prosecution, was it true that you had misappropriated or embezzled funds belonging to the bankrupt corporation, Veraco, Inc., in the sum of approximately $95,000?

A. No.

Q. Was there any truth to that charge made by your brother Buster Autrey to that effect?

A. No, there was no truth whatsoever.

Q. Now, you entered into an agreement with Buster Autrey, you acting on the part of the bankrupt corporation and Buster acting on behalf of Autrey Brothers, Inc., on [67] November 5, 1953, did you? A. Yes.

Q. And that agreement was in writing, was it?

A. Yes.

Q. And in that agreement you admitted in writing, did you, that you owed Buster Autrey and Autrey Brothers $95,000?

A. Yes. We didn't know how much it was or——

Mr. Tobin: I believe, counsel, during the noon hour we agreed that we could use the copy in place

(Testimony of Vernon W. Autrey.)

of bringing the original from the Superior Court (handing document to Mr. Ross).

Mr. Ross: Yes, I am familiar with the document. If you want to have it marked——

Mr. Tobin: Yes.

Mr. Ross: ——It may be received without further identification.

The Clerk: Plaintiff's Exhibit 3.

The Court: All right. You may just refer to it.

Mr. Tobin: This is Plaintiff's Exhibit 3.

The Clerk: For identification?

Mr. Tobin: We are offering it in evidence. It has been stipulated to.

(The document referred to, marked Plaintiff's Exhibit No. 3, was received in evidence.)

Q. (By Mr. Tobin): Now, calling your attention to the [68] provisions in Plaintiff's Exhibit 3, bearing date of November 5, 1953, and particularly provision 3: "Vernon Autrey hereby agrees that he is indebted to Lewis Autrey in the sum of approximately ninety-five thousand dollars"; was that true?

A. Well, there is no way of knowing whether it was true or not, the way it was enforced out. We don't know.

Q. Did you make any investigation to ascertain whether or not you were indebted to Lewis Autrey or Autrey Brothers, Inc., in the sum of $95,000?

A. We tried to, but we never could get together.

Q. How did you arrive at that figure of $95,000?

(Testimony of Vernon W. Autrey.)

A. He arrived at it; not me.

Q. It was his—— A. Suggestion.

Q. ——figure? A. Yes.

Q. Showing you a supplemental agreement, dated November 16, 1953, which we are asking to have marked for identification as Trustee's Exhibit 4 for identification——

The Clerk: Exhibit 4.

(The document referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Tobin): ——was that supplemental agreement signed up and executed on November 16, 1953? A. Yes, it was. [69]

Mr. Tobin: We would like to offer this in evidence, if your Honor please, also.

Mr. Ross: No objection, your Honor.

The Court: All right.

The Clerk: Plaintiff's Exhibit 4.

(The document referred to, marked Plaintiff's Exhibit No. 4, was received in evidence.)

Q. (By Mr. Tobin): Now, these agreements, Plaintiff's Exhibit 3 and Plaintiff's Exhibit 4 now in evidence, were the agreements under which the stores at 2039 West Pico, Los Angeles, 17113 Bellflower Boulevard, Bellflower, 11950 East Garvey Boulevard, El Monte, 850 South Main Street, Salt Lake City, were transferred on November 5, 1953, were they not? A. Yes.

(Testimony of Vernon W. Autrey.)

Q. And the stores at 2800 Northeast Sandy Boulevard, Portland, Oregon, 5311 South Tacoma Way, Tacoma, Washington, and 7808 Arroyo Boulevard, Seattle, Washington, were transferred on November 16, 1953; isn't that true? A. Yes.

Q. Now, in exchange for the transfer of these three stores in Los Angeles County and the one at Salt Lake City, what were you, or, rather, the bankrupt Veraco, Inc., to receive?

A. Full value on the $95,000 that he figured that we owed him. [70]

Q. And what was the credit that was to be extended by Lewis B. Autrey or Autrey Brothers, Inc.?

A. Fair market price and book value of all merchandise.

Q. What was that taken in at, in connection with that agreement, Plaintiff's Exhibit 3?

Mr. Ross: Pardon me. Wasn't there an exhibit attached to the agreement that set the items forth. Mr. Tobin?

Mr. Tobin: There doesn't appear to be here. Oh, yes, it is in the agreement of November 16th——

Withdraw that.

Q. When you had gotten through signing the Plaintiff's Exhibits 3 and 4 in evidence here, what did you have left then to pay the creditors of Veraco, Inc.?

A. Approximately five stores, small stores, value of around $30,000.

(Testimony of Vernon W. Autrey.)

Q. How much?

A. Value, as well as I can remember, of around twenty-five or thirty thousand dollars.

Mr. Ross: I see that counsel is examining what purports to be the bankruptcy file of Veraco; is that right?

Mr. Tobin: That is right.

Mr. Ross: I have no objection to counsel offering anything in that file that he may want to, by reference, in this proceeding, subject to the objection I am going to make [71] generally as to any valuation that existed in August of 1954 as being remote as to the financial condition of Veraco in November, 1953, when this transaction occurred.

The Court: I will overrule the objection.

Q. (By Mr. Tobin): Calling your attention to the schedules in bankruptcy file in this court, in Case No. 62384-T, on August 23, 1954, I will ask you to examine those schedules and tell us if that is your signature on there—"Vernon W. Autrey, president, Veraco, Inc." A. Yes.

Q. And calling your attention to the "Summary of Debts and Assets, Schedules A and B," in that bankruptcy proceeding, I will ask you to state whether or not, at the date of the filing of the petition in bankruptcy in this court, is it or is it not a fact that Veraco, Inc., actually owed $132,271.01?

Mr. Ross: Just a moment. May it be understood that my objection runs to this on the grounds of remoteness, your Honor?

The Court: Yes. I will overrule the objection.

(Testimony of Vernon W. Autrey.)

Mr. Ross: We will stipulate that the schedules so show, Mr. Tobin.

Mr. Tobin: Well, I think, on that question of intent to hinder, delay, or defraud, that the atmosphere is——

The Court: Well, he stipulates that the schedules so [72] show.

Mr. Tobin: Yes, your Honor.

The Court: I think that is sufficient.

Q. (By Mr. Tobin): Are those schedules true and correct, to the best of your knowledge?

A. Yes, they are.

Q. Insofar as the liabilities and assets of the bankrupt corporation are concerned?

A. That is right.

Mr. Tobin: At this time, if your Honor please, we would like to offer these schedules in evidence by reference.

Mr. Ross: Same objection, your Honor.

The Court: I will overrule the objection.

By reference.

(The documents referred to, marked Plaintiff's Exhibit No. 5, were received in evidence by reference.)

Mr. Ross: Mr. Tobin, I don't want to interfere with you, but why don't you ask him if it doesn't show liabilities of fifty-nine thousand against those?

Mr. Tobin: The liabilities are a hundred and thirty-two thousand.

(Testimony of Vernon W. Autrey.)

Mr. Ross: And assets of fifty-nine thousand against those.

Mr. Tobin: Yes, that is what I say. That is what I was trying to ask him. [73]

Q. Was there any——

The Court: The schedules show that.

Mr. Tobin: Yes.

The Witness: Yes.

Q. (By Mr. Tobin) That is a fact, is it not?

A. Yes, on accounts receivable plus the assets. Yes.

Q. Out of the $59,565.40 worth of assets that were on hand to meet $132,271.01 of liabilities at the date of the bankruptcy, $46,235.40 of those were accounts receivable, were they not?

A. Yes.

Q. And those accounts receivable were hypothecated to a finance company, were they not?

A. No.

Q. Where were they?

A. These was accounts receivable of dealerships in various cities that owed Veraco, Inc.

Q. Well, were they collectible, in your opinion, a hundred cents on the dollar, or fifty cents, or what?

A. I believe they were, a hundred cents on the dollar.

Q. I see. At the time you entered into these two agreements, Plaintiff's Exhibits 3 and 4, with Autrey Brothers, Inc., and your brother Lewis B.

(Testimony of Vernon W. Autrey.)

Autrey, you contended, did you not, that they owed you, or owed Veraco, Inc., $52,111.69; isn't that right? [74]

A. No, at the time that we signed these agreements we didn't really know. We didn't know whether they owed us or we owed them.

Q. Did you have an auditor make any audit whatever to ascertain—— A. We tried to.

Q. ——whether or not, in truth and in fact, Veraco, Inc., or you owed Autrey Brothers, Inc., or Buster Autrey $95,000, or whether or not they owed you—— A. We tried to.

Q. ——or your corporation $52,111.69?

A. No. At that time we tried to, several months later, but we never could get the accountant and Lewis B. Autrey to get together to figure it out, you know.

Q. Well, how long did you take to complete these two transactions, that is, the transaction of November 5th and the transaction of November 16th? A. About one hour each time.

Q. About one hour each time. And it was done where?

A. At 1812 Lincoln Boulevard, Autrey Brothers' factory.

Q. You tell us why these transactions were so speedily gone through with.

A. That's the way you have to do business with him, is all I know. You just don't do business on a regular basis. You do it right now or not at all. [75]

Q. When you were first called to the stand here

(Testimony of Vernon W. Autrey.)

today as a witness and the first question was asked you, I believe, regarding your connection with Veraco, Inc., you at first declined to answer on the ground that your answer would tend to degrade and incriminate you, and said you had been so advised. By whom were you advised that if you testified in this case your answer would tend to degrade or incriminate you?

A. I was not advised. I was asking to be advised by my attorney and have him to be present at the questioning here.

Q. When did you last see Buster Autrey?

A. About two months ago.

Q. And where was that?

A. At 7300 South Vermont in Los Angeles.

Q. And you haven't seen him for at least two months? A. Approximately two months.

Q. Has he talked to you on the telephone since this case was set for trial?

A. No, not for the last two months.

Q. Do you know where he is at the present time?

A. No. He is in Los Angeles, as far as I know.

Q. Do you know where?

A. Unless it is at this address.

Q. 7300 South Vermont? [76] A. Yes.

Q. And what is the residence address supposed to be here in Los Angeles?

A. I don't know where he lives.

Q. Now, you employed an auditor in connection with this transaction, did you not?

(Testimony of Vernon W. Autrey.)

A. Yes.

Q. A man by name of Lester Green?

A. Yes.

Q. And the result of his audit indicated that Autrey Brothers owed Veraco the sum of $52,-111.69; isn't that right?

Mr. Ross: To which we object upon the grounds that that would call for hearsay and a conclusion and opinion of this witness, what the auditor found.

The Court: I can let him answer, if he knows.

Do you know?

The Witness: No. With all the records we have or had at Veraco's, that is the only thing we figured out, that it was——

Q. (By Mr. Tobin): It was from the records of Veraco that that figure was arrived at?

A. Yes.

Q. And discussed between you and Lewis Autrey?

A. It was not discussed between Lewis Autrey and myself. It was discussed with Mr. Lester Green and myself. [77]

Q. And you filed an affidavit over here in the Superior Court, in Action No. 625431, Lewis Autrey and Autrey Brothers, Inc., against Vernon Autrey and Veraco, Inc., did you not?

A. No; that was Lewis Autrey filed.

Q. Didn't you file an affidavit in connection with that matter, too?

A. An answer to it, I believe, yes.

(Testimony of Vernon W. Autrey.)

Q. Pardon me? A. Yes, we did.

Q. And in that affidavit, did you not state that instead of you owing Autrey Brothers, Inc., $95,000, that they actually owed your corporation $52,111.69?

A. As well as we could account for, yes.

Q. Yes? A. Yes, we did.

Q. And that was your honest belief, was it not, at the time you signed this agreement?

A. Yes, at that time.

Q. In which you admitted that you owed Autrey Brothers $95,000?

A. Yes, that is after we had released all of the stores to them.

Q. After you had released all of the stores to them, how did you expect to pay about $130,000 of liabilities— [78] $132,000 of liabilities?

Mr. Ross: That is objected to on the ground that it assumes a fact not in evidence, your Honor.

The Witness: We never——

Mr. Ross: Pardon me just a moment.

We object to that because it assumes a fact not in evidence, your Honor. There is no evidence that in November, 1953, Veraco owed any $132,000. The evidence is that they owed it in August, 1954.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Tobin): After you had transferred these stores described in Plaintiff's Exhibits 3 and 4, did the liabilities of Veraco, Inc., increase?

A. Yes.

Q. From what figure to what figure?

A. As well as I can remember, our liabilities at

(Testimony of Vernon W. Autrey.)

that time, November 5th to the 14th or the 16th, was approximately $24,000 overdrawn in the bank and we owed around twenty-five thousand in other payables.

Q. About $50,000? A. Yes.

Q. And then between November 16, 1953, and the date of the bankruptcy of Veraco, Inc., the liabilities of Veraco, Inc., jumped up to $132,000?

A. Yes. [79]

Q. And in November, 1953, that is, November 16, 1953, after you had transferred these eight stores to Autrey Brothers, Inc., what assets did Veraco have remaining to pay its creditors?

A. As well as I remember, it was from twenty-five to thirty thousand dollars of assets.

Q. Did the transfer of these stores from Veraco, Inc., to Vernon Autrey have the effect of rendering Veraco, Inc., insolvent?

A. You mean the transferring from Veraco to Lewis Autrey?

Q. Or to Lewis Autrey, yes.

A. Yes, it did.

Q. Did you tell Lewis Autrey at the time that you made these transfers to him, these eight stores, under threat of criminal prosecution for embezzling $95,000, that if those stores were transferred to him you would not have sufficient to pay your creditors?

A. I think I told that to him and several other people at the time.

Q. Well, him in particular? A. Yes.

(Testimony of Vernon W. Autrey.)

Q. He and Stella Autrey were the owners of Autrey Brothers; is that right?

A. Yes, as well as I know. [80]

Q. Was he a director of Autrey Brothers?

A. I believe he was.

Q. And she is his wife? A. Yes.

(A pause.)

The Court: Anything more from him, Mr. Tobin?

Mr. Tobin: I can't think of anything now, your Honor.

You may cross-examine.

Cross-Examination

By Mr. Ross:

Q. Mr. Autrey, as I understand it, in November, 1953, at the time you executed Plaintiff's Exhibits 3 and 4, you were under the belief that you owed Buster Autrey some money, weren't you?

A. Yes. We really didn't know. We thought Veraco owed Autrey Brothers some money. We did not know.

Q. You honestly believed you owed some money, but didn't know the amount of it; isn't that right?

A. That is right.

Q. You didn't believe you had embezzled any money from your brother, however? A. No.

Q. As a matter of fact, at these two meetings at which Plaintiff's Exhibits 3 and 4 were executed, you had your [81] attorney there, didn't you?

A. Yes, I had an attorney.

Q. And Mr. Buster Autrey, your brother, had

(Testimony of Vernon W. Autrey.)

his attorney there, didn't he? A. Yes.

Q. Nobody used any force on you, did they?

A. No, no force.

Q. Nobody had any deadly weapons or armaments around? A. No.

Q. You had the use of your legs, didn't you?

A. Yes.

Q. In other words, you signed those documents because you honestly believed it was an indebtedness to your brother; isn't that right?

A. Yes, of some sort.

Q. Later you did file a suit in the Superior Court against him, did you not?

A. No, sir.

Q. Or did he file a suit against you?

A. He filed it against me.

Q. And then you filed a cross-complaint in that action, did you not?

A. We were attempting to, but we only answered it.

Q. Now, as a matter of fact, there has been, from time to time, ill feeling between yourself and your brother Lewis [82] Autrey; isn't that true?

A. Yes.

Q. As a matter of fact, isn't it true that these stores that are involved in this litigation, in this lawsuit, were transferred by your brother Lewis Autrey out of Autrey Brothers, a corporation, about a year later, about the time this lawsuit was filed; isn't that right?

A. I don't remember dates.

(Testimony of Vernon W. Autrey.)

Q. Well, didn't Buster Autrey sell to one of the other brothers all of the capital stock of Autrey Brothers, Inc.? A. I heard he did, yes.

Q. And didn't he take out of Autrey Brothers, Inc., the stores on the Pacific coast? A. Yes.

Q. And then about that time didn't you come back with your brother and start operating these various stores that are in dispute here now?

A. Some of them.

Q. Some of them? A. Yes.

Q. And then they were eventually transferred into this CAC Corporation; isn't that right?

A. That is right.

Q. And CAC Corporation filed a petition in this court? A. Yes. [83]

Q. So some of those stores are presently, or were, under the jurisdiction of this court; isn't that right? A. That is right.

Q. Now, you continued to operate Veraco for seven or eight months, did you not, after you made the transfer of these stores to your brother?

A. Approximately that.

Q. And you made an honest endeavor during that time to pay your bills, didn't you?

A. Yes, I did.

Q. And you opened new stores? A. Yes.

Q. Did you have any secret agreement with your brother, Buster, that you had any interest in these stores that you transferred to him? A. No.

Q. Never made any claim to them, did you?

A. No.

(Testimony of Vernon W. Autrey.)

Q. Other than the fact that in this lawsuit you set forth that you were in error when you admitted that you were indebted for $95,000?

A. We figured we overpaid our debt.

Q. As a matter of fact, the affidavit that Mr. Tobin prepared—read to you, was prepared by your attorney; isn't that right? [84]

A. Yes, it was.

Q. From the facts you gave him? A. Yes.

Mr. Ross: I don't think I have anything else, your Honor.

The Court: Is that all, Mr. Tobin?

Mr. Tobin: That is all, your Honor.

The Court: You may step down.

Mr. Tobin: We would like to offer, by reference, if your Honor please, the order approving the trustee's bond in the bankruptcy proceeding.

The Court: All right.

Mr. Tobin: Has the court had an opportunity to read the deposition?

The Court: You just put it in about five minutes to twelve.

Mr. Tobin: Yes, your Honor.

The Court: I was going to try to read it at night. I will have to take the case under submission.

Mr. Tobin: I think that is our case, if your Honor please.

The Court: You already have the deposition in evidence.

Mr. Tobin: Yes, your Honor.

The Court: But I will have to read it tonight. I will have to take the case under submission. [85]

Mr. Tobin: Yes.

The Court: Does the plaintiff rest at this time?

Mr. Tobin: We are resting at this time, yes, your Honor.

The Court: All right.

Mr. Ross: May it please the court, at this time the defendants move for a nonsuit as to each and every cause of action that is pleaded in the plaintiff's complaint and supplemental complaint.

The basis of the motion is this: That the proof before the court establishes only a failure to comply with the bulk sales laws of California and the other states. There is no proof in the deposition or in the testimony that there was any actual fraud in this matter.

Apparently, the evidence is that we have a couple of brothers who are in business together, and they have their fights. So on one occasion one says, "You owe me $95,000. You are going to pay or else."

I am not impressed by the charges of malicious prosecution, when the evidence indicates that each of the parties, at the time the agreements were entered into, without conflict, were represented by attorneys, and Mr. Autrey on the witness stand said there was nothing wrong with his legs—he could have left the meeting and there was no reason for him to stay there if he didn't want to sign this agreement.

In the absence of actual fraud, we have a type of

fraud [86] that is established by law, failure to comply with Section 3440.

Now, the evidence in this case is without dispute that the only creditor that plaintiff has to offer, who was a creditor at the time of the transfer and at the time of the bankruptcy, was the Times-Mirror Company or the Los Angeles Times and/or the Mirror. The evidence indicates that the amounts that were paid on the account of the Times-Mirror Company between the date of the transfer and the adjudication of the bankruptcy exceeded that amount of that account; so therefore the original account was extinguished.

Your Honor is familiar with the rule set forth in Section 1479 of the Civil Code of the State of California, that unless there is a direction or instruction as to the application of payments, first in is first out. So therefore the indebtedness was definitely extinguished.

My case law is submitted in the authorities that were submitted with the motion for summary judgment in the matter. I agree that summary judgent did not reach anything except the Section 3440 situation. If there was proof of actual fraud, then of course there would be a different situation. But I have cited the authorities in there that the trustee does not come into this court as a creditor armed with process. He has nothing to do with an existing creditor. In other words, if the Times-Mirror had money coming in [87] November, 1953, and no payments were made until 1954, then the trustee in bankruptcy would be in the position of the Times-

Mirror armed with a writ of execution, and then the court would be in a position to hold the transfer void and fraudulent and require an accounting.

But here we don't have that sort of thing. This type of lawsuit, may it please your Honor, is a technical thing. It is a creature of the Bankruptcy Act and a group of decisions of the Supreme Court of the United States. I have very carefully cited in the authorities attached to the points and authorities in support of the motion for summary judgment a rather complete statement of the authorities, involving Moore v. Bay, a leading case on the subject, Section 1479, and the other material. I am not going to bore your Honor.

The Court: I had that, and I denied a motion for summary judgment.

Mr. Ross: Yes, your Honor, but obviously the reason for your denial was that, under the complaint, it was not obvious whether it would be actual fraud or constructive fraud. I take the position that if there is no actual fraud in it, these authorities do govern the situation, and that is the defense that we have, and we move for a nonsuit based upon the failure of plaintiff to produce an existing creditor who is in a position to attack the matter [88]

I am sure your Honor will want to read the deposition possibly before passing on this motion, to determine whether your Honor feels that there is evidence of actual fraud or whether this is a case that consists of violating a statute relating to bulk sales.

The Court: I will have to take time out to read the deposition. I can have you come back at 9:30

tomorrow morning. Or do you want to sit around while I read it? I don't like to read it and just come out and give you a snap judgment.

Mr. Ross: No, your Honor. I will do whatever your Honor prefers.

The Court: I will do it either way. I suggest that we adjourn, and I will read the deposition, and then resume at either 9:30 or 10:00 o'clock tomorrow.

Mr. Tobin Would 10:00 o'clock be agreeable, your Honor?

The Court: It makes no difference to us. We are here all the time.

Mr. Ross: May it please the court, in fairness to counsel and yourself, I would like to indicate that we are not going to put on a defense.

The Court: I take it so.

Do you want to make it 10:00 o'clock?

Mr. Ross: 10:00 o'clock is agreeable, your Honor.

The Court: I have to rule on the motion [89] first.

Mr. Ross: Yes.

The Court: So I have to read the deposition.

Mr. Ross: Yes.

The Court: I will have you return at 10:00 o'clock tomorrow morning.

Mr. Ross: That is agreeable.

The Court: All right. That is all I can do.

The witness may be excused. In other words, Mr. Autrey doesn't need to return.

Mr. Ross: No, there is no reason.

The Court: All right. I will take the deposition and read it and see you gentlemen tomorrow at 10:00 o'clock.

Mr. Ross: Yes, your Honor.

Mr. Tobin: Yes, your Honor.

(Thereupon, at 4:30 p.m., an adjournment was taken until Thursday, January 12, 1956, at 10:00 a.m.)

The Clerk: Case No. 1734-TC Civil, Frank M. Chichester v. Autrey Brothers, Inc., and others.

The Court: I have read the deposition, and I had in mind taking the case under submission when I finished, and I thought I would deny your motion for nonsuit at this time.

Mr. Ross: Yes, your Honor.

For the formal record——

The Court: I understood you to say you were not going to offer any testimony.

Mr. Ross: No, your Honor.

The Court: You have briefed the matter before. Do you want to make any oral argument or do you want to submit the matter at this time?

Mr. Ross: I just wanted to add one thing, your Honor.

The Court: I will hear from both counsel, if they want to add anything. But there will be no more testimony taken; was that your thought?

Mr. Ross: Yes, that was my thought.

I am not a believer in extensive oral argument. I have made our position clear as far as the law is

concerned, but I missed one or two points I would like to point out.

The Court: Yes.

Mr. Ross: Stella Autrey is a party defendant to these [91] proceedings. Now, the evidence before your Honor indicates only that she was an officer and director of Autrey Brothers, Inc., the corporation involved. It completely negatives any participation by Mrs. Autrey in these two transfers in November of 1953. She was not an actor, and that is borne out both by the testimony of Vernon, who testified here, and the deposition to which we offered objection but which has been received in evidence.

The Court: Yes, the deposition of Buster.

Mr. Ross: Yes.

As far as Buster is concerned, your Honor, it doesn't show that he received these stores. The test, of course, is, who got the benefit of the transfer? And Autrey Brothers, a corporation, received those stores and operated them.

In other words, my point is, while I am not in any way relinquishing the ground I have taken on my legal theory, that if your Honor does conclude judgment should be for the plaintiff, I don't believe under any circumstances the judgment should be against Stella, because she was not a participant in any way, Buster did not individually benefit; but the judgment should be against the two corporations: Autrey Brothers, Inc., a corporation, and Sleep E-Z Mattress, Inc., a corporation.

I still feel as I indicated before, and I am not going to reargue the matter, that there is an absence

of proof of [92] actual fraud; that there is here merely a situation of violating Section 3440; and the evidence is perfectly clear from the Times that they had received an amount equivalent to the amount that was due at the time of the transfer, between the date of the transfer and the period of bankruptcy.

We have both searched the books back and forth to try to find a decision from the Circuit raising this point. I have found none. I am sure Mr. Tobin would have been yelling from the housetops if he found one. So we have relied on Section 1479 and the cases we have cited thereunder.

That is all I have to say, your Honor.

The Court: Mr. Tobin.

Mr. Tobin: If your Honor please, a corporation acts only through its officers and directors; and in this case we have joint tort feasors, at least the corporation and Buster Autrey. Buster Autrey was the man who engineered this first transfer from the bankrupt corporation to Autrey Brothers, Inc. Then, after the suit was filed, he organizes this other Autrey Brothers or Sleep E-Z Mattress, which he and his wife own and control completely. Then, after his deposition was taken, he took this dormant corporation he had organized and made a second transfer right in the face of this lawsuit here to a corporation owned and controlled entirely by himself and his wife, and the testimony here [93] indicates that there has been a third transfer

made from this second corporation, and we had to make a motion before Judge Byrne to join as a party defendant, and it was made to the CAC, and the CAC finds itself in bankruptcy.

Now, we are really only beginning this litigation, if your Honor please, if the court renders judgment in favor of the plaintiff, because we have the CAC in bankruptcy down here before the referee. These people have been like the Irishman, all the way through: They have just kept one hop ahead of the trustee in bankruptcy of Veraco, Inc. And we feel that the court, exercising its equitable powers or equitable jurisdiction, can follow this property as far as possible.

I don't know what we are going to have to do if we get a judgment against these people for the value of this property. We have to file a suit or a claim in the CAC bankruptcy and then establish before the referee in bankruptcy that this judgment was actually an attempt to follow thousands of dollars worth of property that went out of Veraco to Autrey Brothers, Inc., and Vernon Autrey and Stella Autrey, the sole owners of that corporation, and then from there to Sleep E-Z Mattress Company, and then from there to CAC, and establish a claim in the Bankruptcy Court to try to get a dividend for the defrauded creditors in this case.

Now, as far as the Times-Mirror claim is concerned, I [94] have in mind the case of Brainard v. Cohn, 8 Federal (2d)—I don't remember the exact page, but it about page 7 or 8. In that case, there were a number of fraudulent transfers engineered in

San Francisco to several different people, and the trustee in bankruptcy filed a suit against seven or eight defendants up there in the United States District Court, and among the allegations were the same as we have alleged here: That these transfers were made with intent to hinder, delay, or defraud the creditors; that pursuant to said scheme and device that Section 3440 of the Civil Code was completely ignored and that no bulk sales notices were filed, and that the transfers were made with intent to hinder, delay, or defraud the creditors. The matter was referred to a master for trial, and the master rendered recommendations against each individual for the amount of merchandise actually received by that defendant, on the theory that the defendants were joint tort feasors. The District Court sustained exceptions to the master's findings and rendered judgment individually for each amount of merchandise that was given to each defendant.

The trustee took an appeal to the Ninth Circuit in that case. The Ninth Circuit reversed the District Court and held that they were joint tort feasors, and, as such, each and every party to the scheme was liable for the full amount of the loss [95] sustained.

That comes as close as anything that I know of to using Section 3440 as part of a scheme to defraud creditors. It is true that transfers without change of possession, failure to record a bulk sales notice, or other omissions under Section 3440, standing alone, are merely constructive fraud. But here we have acts on the part of these defendants that indi-

cate a clear intention to put this property out of reach of the creditors of Veraco, Inc., for the benefit of Buster Autrey and Stella Autrey, and as fast they could they ground out corporation charters and formed new corporations and just made another transfer, and there is no way in the world a person can pursue them except by a sweeping judgment.

We respectfully submit, if your Honor please, that the trustee is entitled to the judgment asked for.

Mr. Ross: If it please your Honor and Mr. Tobin, in the first place, on this joint tort feasor situation, who is the tort feasor in this November, 1953, situation? It is, of course, Autrey Brothers, Inc., the corporation, who received this.

Now, who acted for that corporation at that time? It was Buster Autrey and not Stella Autrey.

Your Honor is quite familiar with these tax situations where the Internal Revenue Code places a liability on officers and directors of corporations for taxes that are not paid. Even under those situations, an inactive, nonparticipating [96] officer or director is not liable for the acts of the corporation. It is only where the officer was used and was under a duty to do certain things.

In this case, the record is devoid of any activity or participation by Stella Autrey.

Now, counsel has presented a better argument than the evidence before your Honor indicates here. The evidence before your Honor is rather thin on

the situation. The evidence indicates that in November, 1953, Buster Autrey claimed that Vernon or Veraco was indebted to him in a large sum of money. They have meetings, at which they are both represented by attorneys, and Mr. Vernon Autrey testified here in court that he, in good faith, believed he was indebted to Autrey Brothers or to his brother at the time these transfers were made.

Now, Buster's testimony also indicates that it was his understanding that his brother was indebted to him.

I don't see that there is any inference deducible from that of any intent to hinder, delay, or defraud creditors. I think the most your Honor has in front of him, from the evidence, is a case of constructive fraud, by virtue of a violation of Section 3440, and even if your Honor does find there is actual fraud, obviously Stella Autrey is in no way involved.

The Court: I will take the matter under [97] submission.

Mr. Ross: Thank you, your Honor.

Mr. Tobin: If your Honor please, in order to complete the record, there being no evidence offered in behalf of the defendants and cross-complainants on the counterclaim, we move to dismiss the counterclaim.

Mr. Ross: No objection to that.

The Court: All right. The counterclaim will be dismissed at this time.

I will take the matter under submission.

Mr. Tobin: Thank you.

Reporter's Certificate

I hereby certify that I am duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I futher certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on January 11 and 12, 1956, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of March, A.D. 1956.

/s/ JOHN SWODER,
Official Reporter.

[Endorsed]: Filed March 19, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 91, contain the original:

Debtor's Petition;
Orders of Adjudication;
Order Approving Trustee's Bond;
Complaint;
Answer to Complaint & Counterclaim;

Order Authorizing Joining of Additional Party;

Amended & Supplemental Complaint;

Answer to Amended & Supplemental Complaint;

Order Approving Trustee's Additional Bond;

Judgment & Decree for Plaintiff on Plaintiff's Amended and Supplemental Complaint;

Notice of Appeal;

Appellant's Designation of Contents of Record on Appeal;

Notice of Entry of Judgment;

Appellee's Counter-Designation of Parts of Record on Appeal;

which, together with a full, true and correct copy of the Trustee's Bond and Trustee's Additional Bond; and Plaintiff's exhibits 1A & B and 2; and 1 volume of reporter's transcript of proceedings, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 2nd day of April, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15093. United States Court of Appeals for the Ninth Circuit. Autrey Brothers, Inc., Lewis Autrey, Stella Autrey and Sleep E-Z Mattress Co., a Corporation, Appellant, vs. Frank M. Chichester, as Trustee in Bankruptcy for the Estate of Veraco, Inc., Doing Business as Airest Mattress Co., Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 4, 1956.

Docketed: April 9, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15093

FRANK M. CHICHESTER, as Trustee in Bankruptcy for the Estate of Veraco, Inc., dba Airest Mattress Co., Bankrupt,

Appellee,

vs.

AUTREY BROTHERS, INC., LEWIS AUTREY, STELLA AUTREY and SLEEP E-Z MATTRESS CO., a California Corporation,

Appellants.

APPELLANTS' STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF RECORD MATERIAL TO THE APPEAL

Come now appellants in the above-entitled matter and they do hereby state that the following are the points upon which they intend to rely in the prosecution of said appeal:

(a) That the Trial Court improperly held that subsequent creditors were protected by a violation of the Bulk Sales Statutes in California, Oregon, Washington and Utah.

(b) That the Trial Court erred in holding that the Times-Mirror Corporation was an existing creditor, existing both at the time of the alleged fraudu-

lent conveyances in violation of the Bulk Sales Statutes and also, an existing creditor at the time of the adjudication in bankruptcy of Veraco, Inc.

(c) That the Trial Court erred in finding that the Times-Mirror Company had not been fully paid the amount of its claim between the date of the alleged transfers in violation of the Bulk Sales Laws and the date of the adjudication in bankruptcy of Veraco, Inc.

(d) That there was no evidence to support finding of the Trial Court that the transfers complained of were actually fraudulent and that a finding in that regard is contrary to the evidence.

(e) That the Court erred in receiving in evidence plaintiff's Exhibit No. 2, being the deposition of appellant Lewis Autrey, having been taken on December 22, 1954 and January 6, 1955.

That appellants designate the following parts of the record as being material and necessary for the consideration of the appeal herein:

(a) Phonographic transcript of the Trial Court, consisting of 98 pages.

(b) Plaintiff's Complaint.

(c) Answer to complaint and counter-claim.

(d) Plaintiff's amended and supplemental complaint.

(e) Order for filing amended and supplemental complaint.

(f) Answer to amended and supplemental complaint.

(g) Judgment and decree for plaintiff on plaintiff's amended and supplemental complaint.

(h) Notice of appeal filed herein.

(i) This designation.

Respectfully submitted,

/s/ BERTRAM H. ROSS,
Attorney for Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed April 9, 1956.